12-10

No.

In the Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 08-4917-CV

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL, INTERACTION, PLAINTIFFS-APPELLEES

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, RAJIV SHAH,* IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, AND HIS SUCCESSORS, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, THOMAS R. FRIEDEN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, AND HIS SUCCESSORS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND HER SUCCESSORS, DEFENDANTS-APPELLANTS**

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* Named officials have been substituted for their predecessors pursuant to Fed. R. App. P. 43(c)(2).

** The Clerk of Court is directed to amend the official caption to read as shown above.

Argued: Dec. 9, 2010
Decided: July 6, 2011

OPINION

Before: STRAUB, POOLER, and B.D. PARKER, Circuit Judges.

Judge STRAUB dissents in a separate opinion.

B.D. PARKER, JR., Circuit Judge:

Defendants—Appellants the U.S. Agency for International Development ("USAID"), the U.S. Department of Health and Human Services ("HHS"), and the U.S. Centers for Disease Control and Prevention ("CDC") (collectively, the "Agencies" or "Defendants") appeal from preliminary injunctions entered by the United States District Court for the Southern District of New York (Marrero, *J.*). The district court enjoined the Agencies from enforcing 22 U.S.C. § 7631(f), a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act"), 22 U.S.C. § 7601 *et seq.*, against Plaintiffs-Appellees Alliance for Open Society International, Inc. ("AOSI"), Pathfinder International ("Pathfinder"), Global Health Council ("GHC"), and InterAction. These are non-governmental organizations ("NGOs") engaged in the international fight against HIV/AIDS that receive funding under the Act.

Section 7631(f) of the Leadership Act provides that "[n]o funds made available to carry out this Act . . . may be used to provide assistance to any group or orga-

nization that does not have a policy explicitly opposing prostitution." This provision, as construed and implemented by the Agencies, requires NGOs, as a condition of receiving Leadership Act funds, to adopt a policy explicitly opposing prostitution, and prohibits recipients from engaging in any activities that are "inconsistent" with an anti-prostitution stance. Certain other recipients of Leadership Act funds, such as the World Health Organization, are not bound by this restriction.

As explained below, we conclude that § 7631(f), as implemented by the Agencies, falls well beyond what the Supreme Court and this Court have upheld as permissible conditions on the receipt of government funds. Section 7631(f) does not merely require recipients of Leadership Act funds to refrain from certain conduct, but goes substantially further and compels recipients to espouse the government's viewpoint. *See* 45 C.F.R. § 89.1. Consequently, we agree with the district court that Plaintiffs have demonstrated a likelihood of success on the merits. Finding no abuse of discretion by the district court, we affirm.

BACKGROUND

The Leadership Act

In 2003, Congress passed the Leadership Act "to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics." 22 U.S.C. § 7603 (Supp. III 2009).[1] The Act designates sev-

[1] The Leadership Act was reauthorized and amended in 2008. Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008,

eral avenues through which this international campaign is to be run, including "5-year, global strategies"; the development of vaccines and treatments; and "public-private" partnerships between federal agencies and NGOs, which Congress recognized "have proven effective in combating the HIV/AIDS pandemic." §§ 7601(18), 7603.

The Act reflects Congress's concern with the social, cultural, and behavioral causes of HIV/AIDS. *See* § 7601(15). Section 7601(23), one of forty-one congressional "findings" set forth in § 7601, addresses prostitution: "Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic."

Congress imposed two prostitution-related conditions on Leadership Act funding. First, it specified that no funds made available to carry out the Act may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. § 7631(e). Second, it imposed a Policy Requirement, which specifies that:

> No funds made available to carry out this Act . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World

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Pub. L. No. 110-293, 122 Stat. 2918; *see* 22 U.S.C. § 7671. We cite to the current version of the Act.

> Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

§ 7631(f). This litigation involves only the Policy Requirement. Plaintiffs do not challenge the Requirement's "sex trafficking" component.

Defendants' Initial Implementation of the Policy Requirement

The defendant Agencies implement the Leadership Act by, in part, funding U.S.-based NGOs involved in the international fight against HIV/AIDS. AOSI and Pathfinder are two such organizations. AOSI runs a program in Central Asia that aims to prevent the spread of HIV/AIDS by reducing injection drug use, while Pathfinder works to stem the spread of HIV/AIDS by providing family planning and reproductive health services in more than twenty countries. Both receive funding from sources other than the Agencies and neither supports prostitution. But their work does involve engaging, educating, and assisting groups, such as prostitutes, that are vulnerable to HIV/AIDS, as well as advocating approaches and discussing strategies for fighting HIV/AIDS among prostitutes at, among other places, policy conferences and forums.

After the Leadership Act was enacted, the Department of Justice's Office of Legal Counsel ("OLC") warned that applying the Policy Requirement to U.S.-based organizations would be unconstitutional. Heeding that warning, Defendants initially refrained from enforcing it against U.S.- based NGOs. OLC subsequently changed course and withdrew what it characterized as its prior "tentative advice," asserting that "there are reasonable arguments to support the[] constitutionality"

of applying the Policy Requirement to U.S.-based organizations, and, starting in mid-2005, the Agencies began applying the Requirement to U.S.-based grantees. Specifically, USAID issued a directive requiring that U.S.-based organizations, as a condition of receiving funding under the Act, "must have a policy explicitly opposing prostitution." Defendants also construed the Policy Requirement as prohibiting grantees from engaging in activities that were inconsistent with a policy opposing prostitution. In an effort to remain eligible for Leadership Act funding, both AOSI and Pathfinder adopted policy statements. Pathfinder's, for example, stated that it "opposes prostitution and sex trafficking because of the harm they cause primarily to women."

The District Court's First Decision

In 2005, AOSI and Pathfinder sued the Agencies, contending that conditioning Leadership Act funding on the affirmative adoption of a policy opposing prostitution violated the First Amendment by compelling grantees to adopt and voice the government's viewpoint on prostitution, and by restricting grantees from engaging in privately funded expression that the Agencies might deem insufficiently opposed to prostitution. They also asserted that the Policy Requirement was unconstitutionally vague with respect to what sorts of prostitution-related activity and expression were, in fact, restricted.

The district court granted AOSI and Pathfinder preliminary injunctive relief. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006) ("*Alliance I*"). The court engaged in a thorough analysis of the Supreme Court's "unconstitutional conditions" jurisprudence—focusing, in particu-

lar, on *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), *FCC v. League of Women Voters of California*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), and *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). The court first concluded that, because the Policy Requirement substantially impaired First Amendment protected activity conducted by private entities with private funds as a condition of receiving a government benefit, heightened scrutiny was warranted. *Alliance I*, 430 F. Supp. 2d at 259. The court then concluded that the Policy Requirement, as applied to AOSI and Pathfinder, violated the First Amendment because it was not narrowly tailored, imposed a viewpoint-based restriction on their use of private funds without allowing for adequate alternative channels of communication, and "compel[led] speech by affirmatively requiring [them] to adopt a policy espousing the government's preferred message." *Id.* at 268-76. Accordingly, the court held that AOSI and Pathfinder had demonstrated a likelihood of success on the merits, and had met their burden of showing irreparable harm. *Id.* at 276, 278. The district court thus preliminarily enjoined Defendants from enforcing the Policy Requirement against AOSI or Pathfinder, and Defendants appealed.

The First Appeal

During the course of the first appeal, the Agencies informed us that HHS and USAID were developing guidelines that would allow grantees to establish or work with separate affiliates that would not be subject to the Policy Requirement. The Agencies were of the view that the guidelines would satisfactorily address the relevant constitutional concerns in accordance with our

decision in *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 223-24 (2d Cir. 2006) ("[I]n appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression."). After the guidelines became effective, we remanded the case to the district court to determine in the first instance whether interlocutory relief continued to be appropriate. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 254 Fed. Appx. 843, 846 (2d Cir. 2007) ("*Alliance II*").

The Guidelines

The Guidelines permit recipients of Leadership Act funds to partner with affiliate organizations that do not comply with the Policy Requirement, provided that the recipient and affiliate maintain "adequate separation" so as not to "threaten the integrity of the Government's programs and its message opposing prostitution." HHS Guidance, 72 Fed. Reg. 41,076 (July 26, 2007); USAID Acquisition & Assistance Policy Directive ("AAPD") 05-04 Amendment 1 (July 23, 2007). The Guidelines (which, as discussed *infra*, were slightly revised in 2010), require recipients to have "objective integrity and independence" from any affiliate that "engages in activities inconsistent with [an] opposition to the practice[ ] of prostitution . . . ('restricted activities')." 45 C.F.R. § 89.3 (2010).

The Guidelines, as initially promulgated, provided that a recipient would be deemed to have "objective integrity and independence"—i.e., adequate separation—from an affiliate if (1) the two entities are legally sepa-

rate; (2) no Leadership Act funds are transferred to the affiliate or used to subsidize its restricted activities; and (3) the entities are physically and financially separate. 72 Fed. Reg. at 41,076. The 2007 Guidelines elaborated that "whether sufficient physical and financial separation exists" would be determined "case-by-case," and set forth five, non-exclusive factors relevant to that determination: (i) the existence of separate personnel, management, and governance; (ii) the existence of separate accounts and records; (iii) the degree of separation between the recipient's facilities and facilities used by the affiliate to conduct restricted activities; (iv) the extent to which signs and other forms of identification distinguish the two entities; and (v) the extent to which the government and the Leadership Act program are "protected from public association with the affiliated organization and its restricted activities." *Id.* at 41,077.

The District Court's Second Decision

On remand, AOSI and Pathfinder moved to amend the complaint to add Global Health Council and InterAction (together, the "Associations") as plaintiffs, and to extend the preliminary injunction to cover the Associations. GHC is an alliance of organizations dedicated to international public health. InterAction is an alliance of international development and humanitarian NGOs. Many of the Associations' U.S.-based members—which include Pathfinder, a member of both GHC and InterAction—participate in the international fight against HIV/AIDS, receive Leadership Act funding, are therefore subject to the Policy Requirement, and desire relief from it. These member organizations' HIV/AIDS prevention work includes administering health services and other programs that expressly target at-risk groups like

prostitutes. They also engage in advocacy and discussion concerning controversial global health issues—for example, best practices for reducing HIV/AIDS among prostitutes—at policy forums and conferences.

In August 2008, the district court permitted GHC and InterAction to join the litigation, extended the preliminary injunction to them, and went on to consider whether interlocutory relief continued to be warranted in light of the Guidelines. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 570 F. Supp. 2d 533 (S.D.N.Y. 2008) ("*Alliance III*"). The court held that it was, concluding that the Guidelines did not affect its previous determination that the Policy Requirement impermissibly compelled speech. The court reasoned that "[w]hile the Guidelines may or may not provide an adequate alternate channel for Plaintiffs to express their views regarding prostitution," the clause requiring them to espouse the government's viewpoint "remains intact." *Id.* It also concluded that heightened scrutiny remained applicable because the Policy Requirement discriminates based on viewpoint, and that the Guidelines were too burdensome to cure the Requirement's constitutional defects. *Id.* at 546-49. Accordingly, the court declined to disturb its preliminary injunction. Defendants appealed from both the 2006 and 2008 preliminary injunction orders.

Additional Guidance Promulgated by Defendants

In April 2010, while this appeal was pending, HHS and USAID promulgated further guidance pertaining to the Policy Requirement—HHS in a formal regulation, USAID in a policy directive. HHS, Organizational Integrity of Entities That Are Implementing Programs and

Activities Under the Leadership Act, 75 Fed. Reg. 18,760 (Apr. 13, 2010) (codified at 45 C.F.R. pt. 89); USAID AAPD 05-04 Amendment 3 (Apr. 13, 2010). The new guidance specifies that in order to comply with the Policy Requirement, a Leadership Act grantee must affirmatively state in the funding document that it is "opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children," 45 C.F.R. § 89.1; AAPD 05-04 Amend. 3 at 2, and reaffirms that a recipient "cannot engage in activities that are inconsistent with [its] opposition to prostitution," 75 Fed. Reg. at 18,760. Neither the 2010 nor the 2007 guidance offers recipients insight as to what activities may be deemed "inconsistent" with an "opposition to prostitution."

The new guidance also modified the Guidelines for partnering with an affiliate that does not comply with the Policy Requirement. *See* 45 C.F.R. § 89.3. For example, under the revised Guidelines, which profess to "allow more flexibility for funding recipients," 75 Fed. Reg. at 18,762, legal separation is no longer required but only one factor to be considered, and separate management is no longer expressly identified as a relevant factor, in determining whether a recipient has "objective integrity and independence" from an affiliate, 45 C.F.R. § 89.3.

DISCUSSION

I. Standing

The Agencies initially argue that Plaintiffs lack standing. Plaintiffs bear the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "Because

standing is challenged [here] on the basis of the pleadings, we accept as true all material allegations of the complaint, and must construe the complaint in favor of [Plaintiffs]." *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008) (internal quotation marks omitted). We review questions of standing de novo. *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010).

Three elements comprise the "irreducible constitutional minimum" of standing: (1) the plaintiff must have suffered an injury-in-fact—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the challenged conduct; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61, 112 S. Ct. 2130.

Because GHC and InterAction are suing on behalf of their members, each must establish associational standing by demonstrating that (a) at least one of the association's members would otherwise have standing to sue in its own right—i.e., has constitutional standing; (b) the interests the association seeks to protect are germane to its purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). The district court held that Plaintiffs had established standing. As explained below, we conclude that the district court was correct.

A. Injury-in-Fact

We have little difficulty finding that Plaintiffs have alleged constitutional injury-in-fact, and face actual or imminent harm as a result of the Policy Requirement. They allege that the Requirement has compelled AOSI, Pathfinder, and many of the Associations' members to adopt policy statements that they otherwise would not have adopted, and that it restricts them from engaging in privately funded activities and speech that is essential to their work but that the Agencies might deem inconsistent with an opposition to prostitution.[2] Pathfinder, for example, "wishe[s] to remain neutral" on the issue of prostitution, but adopted an anti-prostitution policy statement in order to avoid losing Leadership Act funding, and alleges that it would, in the absence of the injunctions, self-censor its prostitution-related speech at conferences, in publications, and on its website.

Defendants contend that the alleged injuries are merely conjectural because no plaintiff has "attempted to form an affiliate" and "avail [itself] of th[at] alternative avenue[] for communication." Appellants' Br. 22-23. But standing jurisprudence makes clear that Plaintiffs need not go through the potentially burdensome process of setting up an affiliate organization before they can bring a First Amendment challenge. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) (finding standing where newly enacted statute had not yet been enforced because compliance would have required plaintiffs "to take significant and costly . . . measures," and "the alleged

[2] Plaintiffs allege that twenty of GHC's members and twenty-eight of InterAction's members have adopted anti-prostitution policy statements that they did not wish to make.

danger of th[e] statute [was], in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"). Moreover, as elaborated upon below, *infra* at 238-40, forming an affiliate cannot remedy the grantee's injury resulting from being compelled to affirmatively state the government's position on prostitution.

B. Associational Standing

Defendants contend that GHC and InterAction lack associational standing because they fail the third prong of the *Hunt* test, under which they must establish that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343, 97 S. Ct. 2434. We disagree. As an initial matter, the third prong of the associational standing test is "prudential," not constitutional, and is "best seen as focusing on . . . matters of administrative convenience and efficiency." *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 555-56, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996). Accordingly, district courts possess a degree of discretion in applying it. *See Ctr. for Reprod. Law v. Bush*, 304 F.3d 183, 196 (2d Cir. 2002) (Sotomayor, J.) ("[T]he prudential requirements of standing have been developed by the Supreme Court on its own accord and applied in a more discretionary fashion as rules of judicial self-restraint further to protect, to the extent necessary under the circumstances, the purpose of Article III." (internal quotation marks omitted)). Here, the district court correctly concluded that "neither the claims asserted nor the relief requested by the Associations would require any significant participation of indi-

vidual members in the lawsuit." *Alliance III*, 570 F. Supp. 2d at 543.

We agree with the district court that the "relief requested" component of the third *Hunt* prong has been satisfied because the Associations seek an injunction barring enforcement of the Policy Requirement, which will not necessitate the participation of individual members in the lawsuit. *See Warth v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (when an association seeks equitable relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured"). However, as the Agencies correctly assert, the third prong of the *Hunt* test is not "automatically satisfie[d]" whenever an association "request[s] equitable relief rather than damages." *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004). Courts "also must examine the claims asserted to determine whether they require individual participation." *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993); *see Bano*, 361 F.3d at 714 ("[An] organization lacks standing to assert claims of injunctive relief on behalf of its members where the fact and extent of the injury that gives rise to the claims for injunctive relief would require individualized proof. . . . " (internal quotation marks omitted)).

The Agencies argue that "[i]ndividualized proof is required" in this case because resolving whether the Guidelines permit recipients to set up adequate alternative channels for protected expression necessitates a fact-specific determination for each recipient. Appellants' Br. 25. First, it is self-evident that, as the district court concluded, individualized proof is *not* required for

the compelled speech and vagueness claims, "as it is the conduct of Defendants in the form of the Policy Requirement and the Guidelines that will be the primary subject of inquiry." *Alliance III*, 570 F. Supp. 2d at 543. With respect to the adequate alternative channels analysis, we agree with the district court that while it will "require a more thorough factual development to establish the extent of the burden on the Associations' members," individualized evidence of members' efforts to comply with the Guidelines "would be duplicative and redundant[,] counsel[ing] in favor of granting associational standing in the interests of judicial economy." *Id.* at 544; *see Nat'l Ass'n of Coll. Bookstores v. Cambridge Univ. Press*, 990 F.Supp. 245, 250 (S.D.N.Y.1997) ("The fact that a limited amount of individuated proof may be necessary does not in itself preclude associational standing."). This reasoning finds support in *Hunt* itself, which held that an association of apple growers had standing to challenge a statute, notwithstanding the varied nature and extent of the burdens suffered by the association's members in complying with the statute. *See* 432 U.S. at 343-44, 97 S. Ct. 2434. Accordingly, we conclude that GHC and InterAction have adequately alleged associational standing.

II. Preliminary Injunctions

We review the grant of a preliminary injunction for abuse of discretion. *Alleyne v. N.Y. State Educ. Dep't*, 516 F.3d 96, 100 (2d Cir. 2008). "A district court abuses its discretion when (1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Mul-*

lins v. City of New York, 626 F.3d 47, 51 (2d Cir. 2010) (internal quotation marks omitted). Where, as here, the moving parties seek to "stay[] government action taken in the public interest pursuant to a statutory or regulatory scheme," they must establish (1) a likelihood of success on the merits, and (2) irreparable harm in the absence of an injunction. *Alleyne*, 516 F.3d at 100 (internal quotation marks omitted); *accord Lynch v. City of New York*, 589 F.3d 94, 98 (2d Cir. 2009). Ultimately, "[i]f the underlying constitutional question is close, . . . we should uphold the injunction." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 185 (2d Cir. 2010) (alteration in original) (quoting *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004)).

On appeal, Defendants challenge the district court's determination that Plaintiffs are likely to succeed on the merits. They do not contest the district court's finding of irreparable harm. We conclude that Plaintiffs have demonstrated a likelihood of success on the merits because the Policy Requirement likely violates the First Amendment by impermissibly compelling Plaintiffs to espouse the government's viewpoint on prostitution.

A. The Policy Requirement Likely Violates the First Amendment

1. Spending Clause and Unconstitutional Conditions Jurisprudence

The Spending Clause of the Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. This provision allows Con-

gress to "condition[] [the] receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980)). It is well settled that Congress is entitled to further policy goals indirectly through its spending power that it might not be able to achieve by direct regulation. *See id.* at 207, 107 S. Ct. 2793 ("[O]bjectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." (internal quotation marks and citation omitted)). Congress's power under the Spending Clause is broad, as "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Id.* at 209, 107 S. Ct. 2793.

Defendants contend that because the Leadership Act is a Spending Clause enactment, and Plaintiffs are free to decline funding if they do not wish to comply with its conditions, the Policy Requirement should be subjected to only minimal scrutiny under *Dole*. But Congress's spending power, while broad, is not unlimited, and other constitutional provisions may provide an independent bar to the conditional grant of federal funds. Pursuant to this "unconstitutional conditions" doctrine, as it has come to be known, the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance. *See Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570

(1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."). As the Supreme Court recently reiterated, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) ("FAIR") (internal quotation marks omitted).

This tension between the breadth of Congress's spending power on one hand and the principle that a condition on the receipt of federal funds may not infringe upon the recipient's First Amendment rights on the other has given rise to three seminal Supreme Court decisions and several related cases from our Circuit. The Supreme Court cases are *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), *FCC v. League of Women Voters of California*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), and *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). Our cases include a series of decisions concerning conditions imposed upon recipients of funding from the Legal Services Corporation ("LSC"): *Velazquez v. Legal Services Corp.*, 164 F.3d 757 (2d Cir. 1999) ("*Velazquez I*"), *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) ("*Velazquez II*"), and *Brooklyn Le-*

gal Services Corp. v. Legal Services Corp., 462 F.3d 219 (2d Cir. 2006) ("*BLS*").

In *Regan*, plaintiff Taxation With Representation ("TWR"), a nonprofit lobbying corporation, challenged a statute that denied tax deductions to organizations that engaged in "substantial lobbying." 461 U.S. at 541, 544, 103 S. Ct. 1997; *see* 26 U.S.C. § 501(c)(3). TWR argued that the prohibition against substantial lobbying by § 501(c)(3) organizations imposed an unconstitutional condition on the receipt of tax-deductible contributions. The Supreme Court disagreed, concluding that TWR remained free to receive deductible contributions to support its nonlobbying activity, and could create a separate, taxexempt affiliate under § 501(c)(4) to pursue its lobbying activity. *Id.* at 544-45, 103 S. Ct. 1997. Given that alternative, the Court concluded that Congress "ha[d] not infringed any First Amendment rights or regulated any First Amendment activity," but "simply chosen not to pay for TWR's lobbying." *Id.* at 546, 103 S. Ct. 1997. In a concurring opinion, Justice Blackmun emphasized "the saving effect of § 501(c)(4)," stating his view that " § 501(c)(3) alone" would be "constitutional-[ly] defect[ive]," but that "[a] § 501(c)(3) organization's right to speak is not infringed, because it is free to [lobby] through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities." *Id.* at 552-53, 103 S. Ct. 1997 (Blackmun, J., concurring).

The following term, the Supreme Court decided *League of Women Voters*, which involved a First Amendment challenge to a provision in the Public Broadcasting Act that prohibited stations receiving federal funds from "editorializing." 468 U.S. at 367, 104 S. Ct. 3106. The Court struck down the provision, trou-

bled by the fact that it "barred [a grantee] from using even wholly private funds to finance its editorial activity." *Id.* at 400, 104 S. Ct. 3106 (stating that "unlike the situation faced by [TWR], a [station] that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing"). The Court noted, however, that if recipients were permitted "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of [*Regan*]," as the recipient "would be free, in the same way that [TWR] was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities." *Id.*

The Supreme Court elaborated on these themes in *Rust*, which involved a facial challenge to HHS regulations implementing Title X of the Public Health Service Act. 500 U.S. at 177-78, 111 S. Ct. 1759. Title X authorizes HHS to make grants to organizations to help them run "family planning projects," but provides that no Title X funds "shall be used in programs where abortion is a method of family planning." *Id.* at 178, 111 S. Ct. 1759 (quoting 42 U.S.C. §§ 300(a), 300a-6). The HHS regulations prohibited Title X projects from providing abortion counseling or referrals, or engaging in any activities that encourage, promote, or advocate abortion as a method of family planning. *Id.* at 179-80, 111 S. Ct. 1759. However, the regulations allowed grantees to engage in abortion-related activities as long as their Title X projects maintained "objective integrity and independence" from such activities—a determination to be made

by HHS based on factors such as the existence of separate personnel, and the degree of separation between the Title X project and facilities used for restricted activities. *Id.* at 180-81, 111 S. Ct. 1759 (quoting 42 C.F.R. § 59.9 (1989)). The *Rust* plaintiffs argued that the regulations violated the First Amendment because they "discriminat[ed] based on viewpoint [by] prohibit[ing] all discussion about abortion as a lawful option," and because they conditioned the receipt of Title X funds on relinquishing the right to engage in abortion- related speech. *Id.* at 192, 196, 111 S. Ct. 1759 (internal quotation marks omitted).

The Supreme Court disagreed, concluding that "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.* at 193, 111 S. Ct. 1759 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."). It held that the regulations "do not force the Title X grantee to give up abortion-related speech," but "merely require that the grantee keep such activities separate and distinct from Title X activities." *Id.* at 196, 111 S. Ct. 1759. The Court emphasized that this was unlike the funding condition found unconstitutional in *League of Women Voters*, where "the Government ha[d] placed [the] condition on the *recipient* of the subsidy rather than on a particular program or service." *Id.* at 197, 111 S. Ct. 1759 (emphasis in original).

We turn now to three decisions of this Court arising under the Legal Services Corporation Act of 1974, pur-

suant to which the LSC makes grants to local organizations that provide free legal assistance to indigent clients. *Velazquez I*, 164 F.3d at 759. In 1996, Congress passed legislation barring LSC grants to entities that engage in certain activities, such as lobbying or class actions, thereby "restrict[ing] grantees' use of non-federal and federal funds alike." *Id.* at 760. In order to cure the "constitutional infirmities" of the 1996 restrictions, LSC issued "program integrity" regulations, modeled after those upheld in *Rust*, allowing grantees to affiliate with organizations that did engage in prohibited activities, as long as the entities maintained adequate physical and financial separation. *Id.* at 761-62.

In *Velazquez I*, we considered a facial challenge to the 1996 statute and LSC regulations, which the plaintiffs argued "impermissibly burden[ed] grantees' exercise of First Amendment activities," and "constitut[ed] a viewpoint-based restriction on expression." *Id.* at 763. Judge Leval, writing for the majority, synthesized *Regan*, *League of Women Voters*, and *Rust* as establishing "that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Id.* at 766. The facial challenge therefore failed, because although the affiliate option might, as applied to some LSC grantees, prove unduly burdensome, there was no reason to think this would be true for all grantees. *Id.* at 767. However, one provision in the 1996 statute, which prohibited grantees from representing clients challenging existing welfare law, was held invalid as impermissible viewpoint discrimination. *Id.* at 769-72.

The Supreme Court affirmed our invalidation of that viewpoint-based restriction in *Velazquez II*. 531 U.S. at 540-41, 121 S. Ct. 1043. The Court interpreted *Rust* as having implicitly "reli[ed] on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech," explaining that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government use[s] private speakers to transmit information pertaining to its own program." *Id.* at 541, 121 S. Ct. 1043 (internal quotation marks and citation omitted). The *Velazquez II* Court held, however, that the LSC program, unlike Title X, was not "designed . . . to promote a governmental message," as an LSC-funded lawyer "is not the government's speaker," but rather "speaks on the behalf of his or her private, indigent client." *Id.* at 542, 121 S. Ct. 1043. Therefore, *Rust* did not save the viewpoint-based restriction on seeking welfare reform. The Court declined to review the portion of *Velazquez I* that had upheld the LSC's program integrity regulations. 532 U.S. 903, 121 S. Ct. 1224, 149 L. Ed. 2d 135 (2001) (Mem.) (denying certiorari).

Following *Velazquez II*, the *Velazquez* plaintiffs brought an as-applied challenge to the LSC regulations. *BLS*, 462 F.3d at 224. The district court enjoined application of the regulations, reasoning that they imposed an "undue burden" on the plaintiffs' First Amendment rights, as LSC's interest in program integrity could be fulfilled by "means less restrictive." *Id.* at 222, 229. On appeal, we held that the district court's application of an undue burden/less-restrictive-means test to the regulations was error, reiterating the standard articulated in

Velazquez I—that grantees' First Amendment rights may be burdened if they are left with "adequate alternative channels" for protected expression. *Id.* at 229-31. We therefore remanded for the district court to evaluate the program integrity regulations under that standard.

2. The Policy Requirement Warrants Heightened Scrutiny

Applying these cases to the one before us, we conclude that the Policy Requirement, as implemented by the Agencies, falls well beyond what the Supreme Court and this Court have upheld as permissible funding conditions. Unlike the funding conditions in the cases discussed above, the Policy Requirement does not merely restrict recipients from engaging in certain expression (such as lobbying (*Regan*), editorializing (*League of Women Voters*), abortion-related speech (*Rust*), or welfare reform litigation (the LSC cases)), but pushes considerably further and mandates that recipients affirmatively *say* something—that they are "opposed to the practice[ ] of prostitution," 45 C.F.R. § 89.1. The Policy Requirement is viewpoint-based, and it compels recipients, as a condition of funding, to espouse the government's position.

Compelling speech as a condition of receiving a government benefit cannot be squared with the First Amendment. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714-17, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (finding unconstitutional requirement that drivers, as condition of using the roads, display state motto "Live Free or Die" on license plates); *Speiser v. Randall*, 357 U.S. 513, 518-19, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (finding unconstitutional requirement that veterans, as con-

dition of receiving property tax exemption, declare that they do not advocate the forcible overthrow of government); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (finding unconstitutional requirement that schoolchildren, as condition of going to school, salute the flag; stating that such "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence").

Here, much as in *Wooley*, *Speiser*, and *Barnette*, silence, or neutrality, is not an option for Plaintiffs. In order to avoid losing Leadership Act funding, they must declare their opposition to prostitution. As Defendants correctly point out, these traditional "compelled speech" cases involved already-existing public benefits, not government funding programs, and are therefore distinguishable in that respect. But these cases teach that where, as here, the government seeks to affirmatively require government-preferred speech, its efforts raise serious First Amendment concerns.[3] The Supreme

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[3] The dissent devotes considerable energy to the effort of showing that *Wooley*, *Speiser*, and *Barnette* do not control this case. We do not suggest that they do. Indeed, as the dissent acknowledges, we expressly recognize that these compelled speech cases are distinguishable. But we do draw from them the underlying principle that the First Amendment does not look fondly on attempts by the government to affirmatively require speech. In doing so, we do not "put[] . . . aside" the unconstitutional conditions doctrine, Dissent at 255, but rather realize that although *Regan* and its progeny unquestionably provide the framework for our analysis, they do not capture the Policy Requirement as neatly as the dissent suggests. The dissent asserts that "[n]one of those [unconstitutional conditions] cases turned on whether the alleged speech restriction was affirmative or negative," Dissent at 257, but that is easy to say when none of those cases *involved* an affirmative speech restriction. It is partly because the Policy Requirement is just such a restric-

Court recently implied as much in *FAIR*, where it upheld the Solomon Amendment's requirement that universities permit military recruiters on campus as a condition of receiving federal funding. The Court noted that "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." 547 U.S. at 61-62, 126 S. Ct. 1297. The Policy Requirement calls for exactly that.

The Policy Requirement is also viewpoint-based, because it requires recipients to take the government's side on a particular issue. It is well established that viewpoint-based intrusions on free speech offend the First Amendment. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (stating "broad[] principle [that] [r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment" (internal quotation marks omitted)).

Although viewpoint-based funding conditions that target speech are not necessarily unconstitutional, *see Rust*, 500 U.S. 173, 111 S. Ct. 1759, such conditions are constitutionally troublesome. In *Regan*, for example, the Court applied minimal scrutiny in reviewing a condition that was, unlike the Policy Requirement, decidedly

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tion that it pushes beyond the restrictions upheld in *Regan*, *Rust*, and the LSC cases, and that we conclude Plaintiffs are likely to succeed in demonstrating that it is an unconstitutional condition.

viewpoint-*neutral* (it banned *all* lobbying by § 501(c)(3) organizations, regardless of the nature of the legislation or the organization's position on it). *See* 461 U.S. at 541, 548, 103 S. Ct. 1997. In *League of Women Voters*, which invalidated a viewpoint-neutral restriction on "editorializing," all four dissenting Justices indicated that if the restriction *were* viewpoint-based, they too would find it constitutionally problematic. *See* 468 U.S. at 407-08, 104 S. Ct. 3106 (Rehnquist, J., dissenting) (emphasizing that condition was "strictly neutral," not directed at "editorial views of one particular ideological bent"); *id.* at 413, 104 S. Ct. 3106 (Stevens, J., dissenting) ("[O]f greatest significance for me, the statutory restriction is completely neutral in its operation—it prohibits all editorials without any distinction being drawn concerning . . . the point of view that might be expressed."); *cf. Rosenberger*, 515 U.S. at 829, 115 S. Ct. 2510 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

The LSC cases confirm this conclusion. In *Velazquez I*, we invalidated as viewpoint-discriminatory a restriction prohibiting LSC grantees from representing clients seeking welfare reform. 164 F.3d at 769-72. The Supreme Court affirmed, concluding that *Rust* could not justify the restriction because although, as *Rust* had implicitly established, "viewpoint-based funding decisions can be sustained in instances in which . . . the government use[s] private speakers to transmit information pertaining to its own program," the LSC grantees were not speaking on behalf of the government. *Velazquez II*, 531 U.S. at 540-42, 121 S. Ct. 1043 (internal quotation marks omitted). Finally, in *BLS*, while we re-

manded for the district court to apply the "adequate alternative channels" test to the LSC's viewpoint-neutral program integrity regulations, we expressly recognized, citing *Velazquez I*, that "substantive restrictions that are directed toward speech as such" might require "closer attention"—an issue that "[went] to the . . . statutory restrictions challenged in [the LSC] cases." *See BLS*, 462 F.3d at 230. The Policy Requirement is substantive, viewpoint-based, and "directed toward speech," as it affirmatively requires recipients *to speak*. It is this bold combination in a funding condition of a speech-targeted restriction that is both affirmative and quintessentially viewpoint-based that warrants heightened scrutiny.

Furthermore, the targeted speech, concerning prostitution in the context of the international HIV/AIDS-prevention effort, is a subject of international debate. The right to communicate freely on such matters of public concern lies at the heart of the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) ("[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." (internal quotation marks omitted)). The Policy Requirement offends that principle, mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue where the differences are both real and substantive. For example, the World Health Organization ("WHO") and the Joint United Nations Programme on HIV/AIDS ("UNAIDS") have recognized advocating for the reduction of penalties for prostitution—to prevent such penalties from interfering with outreach efforts—as among the *best* practices for HIV/

AIDS prevention.[4] Plaintiffs claim that being forced to declare their opposition to prostitution "harms [their] credibility and integrity as NGOs, which generally avoid taking controversial policy positions likely to offend host nations [and] partner organizations," and risks "offending all of the[] groups whose approach to HIV/AIDS may differ from that of the government," not to mention some of the very people, prostitutes, "whose trust they must earn to stop the spread of HIV/AIDS." Appellees' Br. 11-12.

3. *Rust* and the Government—Speech Doctrine

In defending the Policy Requirement's viewpoint-based speech mandate, the Agencies turn to *Rust*, which upheld a viewpoint-based prohibition on abortion counseling. Since *Rust*, the Supreme Court has "explained" that decision as having implicitly relied upon a "government speech" principle, stating that: "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government use[s] private speakers to transmit information pertaining to its own program." *Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043 (internal quotation marks and citation omitted). This is because "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833, 115 S. Ct.

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[4] The dissent declines to comment on the type of speech at issue, and asserts that "the substantive validity" of Plaintiffs' position on prostitution is "not determinative of whether the Policy Requirement is constitutional." Dissent at 266. But we do not suggest that the *validity* of Plaintiffs' position on the proper approach to prostitution is relevant; rather, it is the fact that the targeted speech concerns a controversial public issue that is constitutionally significant.

2510 ("[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."). Therefore, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.*

According to the Agencies, this case is, like *Rust*, a government-speech case because in enacting the Leadership Act, Congress "sought to advance to the greatest extent possible its message opposing prostitution," "chose to enlist the recipients of Leadership Act funding to disseminate its message," and, "to ensure that the message was conveyed effectively, . . . required that those recipients have [an antiprostitution] policy." Appellants' Br. 32; *see DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d 758, 761-63 (D.C. Cir. 2007) (upholding Policy Requirement). We are not persuaded.

The Policy Requirement goes well beyond the funding condition upheld in *Rust* because it compels Plaintiffs to voice the government's viewpoint and to do so as if it were their own. Indeed, the *Rust* Court expressly observed that "[n]othing in [the challenged regulations] *requires a doctor to represent as his own any opinion that he does not in fact hold.*" 500 U.S. at 200, 111 S. Ct. 1759 (emphasis added). Rather, the grantee's staff could remain "silen[t] with regard to abortion," and, if asked about abortion, was "free to make clear that advice regarding abortion is simply beyond the scope of

the program." *Id.*[5] Here, on the other hand, Plaintiffs do not have the option of remaining silent or neutral. Instead, they must represent as their own an opinion—that they affirmatively oppose prostitution—that they might not categorically hold. Suffice it to say that *Rust* would have been a very different case had the government gone as far as requiring Title X recipients to affirmatively adopt a policy statement opposing abortion, in the way the Leadership Act mandates the adoption of a policy statement opposing prostitution. The government has, by compelling NGOs to affirmatively pledge their opposition to prostitution, stepped beyond what might have been appropriate to ensure that its anti-prostitution message would not be "garbled" or "distorted," *Rosenberger*, 515 U.S. at 833, 115 S. Ct. 2510.

We do not mean to imply that the government may never require affirmative, viewpoint-specific speech as a condition of participating in a federal program. To use an example supplied by Defendants, if the government were to fund a campaign urging children to "Just Say No" to drugs, we do not doubt that it could require grantees to state that they oppose drug use by children. But in that scenario, the government's program *is*, in effect, its message. That is not so here. The stated purpose of the Leadership Act is to *fight HIV/AIDS*, as well as tuberculosis, and malaria.[6] Defendants cannot now

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[5] The *Rust* Court made these observations in the course of addressing the plaintiffs' claim that the regulations violated the First Amendment rights of the grantee's staff, a claim the Court stated was governed by the "same principles" as the claim that the regulations violated the First Amendment rights of the grantee. 500 U.S. at 198, 111 S. Ct. 1759.

[6] The dissent's counter-hypothetical, involving "potential grantees who do not actually oppose drug use by children, but are tempted by

recast the Leadership Act's global HIV/AIDS-prevention program as an anti-prostitution messaging campaign. *Cf. Velazquez II*, 531 U.S. at 547, 121 S. Ct. 1043 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."). If the government-speech principle allowed Congress to compel funding recipients to affirmatively espouse its viewpoint on every subsidiary issue subsumed within a federal spending program, the exception would swallow the rule.

Defendants assert that advocating against prostitution is indeed "central" to the Leadership Act program, Appellants' Br. 32, but it is difficult to reconcile that assertion with what the Act does. As we have seen, the Policy Requirement expressly exempts three organizations and all U.N. agencies from having to comply with it. 22 U.S.C. § 7631(f) ("[T]his subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency."). As previously noted, the WHO and UNAIDS have taken a public position at odds with the Policy Requirement, recognizing the reduction of penalties for prostitution as a best practice in the fight against HIV/AIDS. Defendants attempt to distinguish these

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the offer of funds," Dissent at 264, misses the point. Our analysis does not turn on whether individual grantees actually disagree with the government-mandated speech, but rather on the nature of the program. We use the phrase "do so as if it were their own," *supra* at 237, simply to highlight the invasiveness of a condition that requires a recipient to affirmatively represent to the world that it, as an independent, nongovernmental entity, holds an opinion—the government's opinion—that it may or may not in fact hold.

exempted recipients on the ground that they are "public international organizations," such that forcing them to adopt an antiprostitution policy would require "multilateral negotiations." Appellants' Br. 58. But if anti-prostitution advocacy were central to the government's program, it could, of course, simply choose not to fund these organizations. In short, the Agencies' suggestion that requiring Plaintiffs to adopt an anti-prostitution policy statement is integral to the Leadership Act program is undermined by the fact that the government has chosen to fund high-profile, global organizations that remain free to express—and indeed openly express—a contrary policy, or no policy at all.[7]

Nor are we persuaded by the Agencies' argument that the Policy Requirement is entitled to "leeway" because it implicates "foreign affairs." Appellants' Br. 34-35. While mindful of the government's strong interest in managing international relations, we agree with the district court that this interest, in this case, does not warrant the deference that the Agencies request. *See Alliance I*, 430 F. Supp. 2d at 265-67. The Agencies' reliance on *DKT Memorial Fund Ltd. v. Agency for International Development*, 887 F.2d 275 (D.C. Cir. 1989), is misplaced, as that case centered around a restriction on the First Amendment activities of *foreign* NGOs receiving U.S. government funds. The challenge here is to the impact of the Policy Requirement on *domestic* NGOs. Indeed, the Agencies have applied the

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[7] Contrary to the dissent's suggestion, we do not make any "policy judgment" in connection with Congress's decision to exempt these organizations. Dissent at 266. We simply note that § 7631(f)'s exemption clause undercuts the Agencies' assertion that the adoption of an anti-prostitution policy is central to the Leadership Act program.

Policy Requirement to foreign organizations since its inception, without challenge. This litigation arose only after the government reversed course and began also applying the Requirement to U.S.- based organizations like AOSI and Pathfinder. The Policy Requirement compels domestic NGOs to adopt a policy statement on a particular issue, and prohibits them from engaging in certain expression at, for example, conferences and forums throughout the United States. These factors convince us that the speech is far more of a domestic than a foreign concern.

4. The Guidelines

Finally, the Agencies contend that any compelled-speech type problems in the Policy Requirement are successfully addressed by the Guidelines because any entity unwilling to state its opposition to prostitution can form an affiliate that does so. As a consequence, the Agencies assert, the parent organization is not compelled to speak any message at all. But this assertion fails to confront the fact that whether the recipient is a parent or an affiliate, it is required to affirmatively speak the government's viewpoint on prostitution. The "adequate alternative channels for protected expression" test, which is predicated on the rationale that limitations on speech are permissible if grantees can express their opinions elsewhere, does not provide the proper framework for evaluating the Policy Requirement's speech mandate. The curative function of an "adequate alternative channel" is to alleviate the burden of a constraint on speech by providing an *outlet* that allows an organization to engage—through the use of an affiliate—in the privately funded expression that otherwise would have been impermissibly prohibited by the

federal program. For example, in *Regan*, a § 501(c)(3) organization's ability to form a § 501(c)(4) affiliate freed it to engage in privately funded lobbying, and, in *League of Women Voters*, the funding restriction would have been saved if the recipient stations had been allowed to form affiliates to engage in privately funded editorializing. It simply does not make sense to conceive of the Guidelines here as somehow addressing the Policy Requirement's affirmative speech requirement by affording an outlet to engage in privately funded *silence*; in other words, by providing an outlet to do nothing at all. It may very well be that the Guidelines afford Plaintiffs an adequate outlet for expressing their opinions on prostitution, but there remains, on top of that, the additional, affirmative requirement that the recipient entity pledge its opposition to prostitution. As the district court aptly stated, "[w]hile the Guidelines may or may not provide an adequate alternate channel for Plaintiffs to express their views regarding prostitution, the clause requiring Plaintiffs to adopt the Government's view regarding . . . prostitution remains intact." *Alliance III*, 570 F. Supp. 2d at 545. The Guidelines, by their very nature, do not account for that requirement.

For the reasons set forth above, we conclude that Plaintiffs have demonstrated a likelihood of success on the merits of their First Amendment challenge. Because the Policy Requirement compels grantees to espouse the government's position on a controversial issue, the district court did not abuse its discretion in preliminarily enjoining its enforcement pending a trial on the merits.[8]

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[8] Because we affirm on this ground, we, like the district court, do not reach Plaintiffs' argument that the Policy Requirement, as imple-

CONCLUSION

The district court's grant of preliminary injunctive relief is AFFIRMED.

STRAUB, Circuit Judge, dissenting:

The majority today holds that the Policy Requirement "falls well beyond what the Supreme Court and this Court have upheld as permissible conditions on the receipt of government funds." Maj. Op. at 223. On the contrary, the Policy Requirement, together with the Guidelines implemented by Defendants, is precisely in line with the "unconstitutional conditions" doctrine as it has been applied in the context of subsidy conditions alleged to violate the First Amendment. The Policy Requirement neither imposes a coercive penalty on protected First Amendment rights nor discriminates in a way aimed at the suppression of any ideas. Furthermore, the viewpoint-based nature of the Policy Requirement is entirely proper because the Leadership Act does not implicate public-forum principles, but rather allows the government to subsidize the transmittal of a mes-

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mented by the Agencies, is unconstitutionally vague with respect to what sorts of speech are prohibited as "inconsistent with [an] opposition to the practice[] of prostitution." 45 C.F.R. § 89.3. Plaintiffs contend that because the Agencies have not promulgated any guidance regarding the kinds of speech and activities that will be deemed insufficiently opposed to prostitution, it is unclear in what prostitution-related expression grantees may, and may not, engage. Plaintiffs point out that the restrictions on speech at issue in the LSC cases, the cases on which the Agencies have attempted to model the instant regime, were substantially more specific than the Policy Requirement is here. Indeed, oral argument left us with the distinct impression that not even Defendants have a grasp on what it means to engage in expression that is "inconsistent" with an opposition to prostitution.

sage it has concluded is part of its preferred method of fighting HIV/AIDS. Therefore, heightened scrutiny is not proper in this case. Because the Policy Requirement is an entirely rational exercise of Congress's powers pursuant to the Spending Clause and because Plaintiffs have not shown that they are likely to succeed on the merits of their claim that the Policy Requirement is unconstitutional, I would vacate the District Court's grant of a preliminary injunction. Accordingly, I respectfully dissent.

I

A further explanation of the Leadership Act may be helpful in understanding the purpose of the funding restriction at issue here. In 2003, Congress enacted the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, Pub. L. No. 108-25, 117 Stat. 711 (codified as amended at 22 U.S.C. § 7601 *et seq.*). The Act was reauthorized and amended in 2008. *See* 22 U.S.C. § 7671; Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, 122 Stat. 2918 (codified at 22 U.S.C. § 7601 *et seq.*). The current version of the Act directs the President to "establish a comprehensive, integrated, 5-year strategy to expand and improve efforts to combat global HIV/AIDS," 22 U.S.C. § 7611(a), and provides $48 billion of taxpayer funds to fight the epidemic over five years, *id.* § 7671(a). The Act provides that this strategy shall "make the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts by," among other means, "promoting abstinence from sexual activity and encouraging monogamy and faithfulness," "educating men and boys about the risks of procuring sex commer-

cially and about the need to end violent behavior toward women and girls," "supporting partner country and community efforts to identify and address social, economic, or cultural factors, such as . . . gender-based violence [and] lack of empowerment for women . . . , which directly contribute to the transmission of HIV," "promoting cooperation with law enforcement to prosecute offenders of trafficking, rape, and sexual assault crimes with the goal of eliminating such crimes," and "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children." *Id.* § 7611(a)(12)(A), (F)-(G), (I)-(J). Congress explicitly found that

> [p]rostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic.

Id. § 7601(23).

In light of its goal to provide funding for "private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS," *id.* § 7603(4), and its strategy of doing so, in part, by "encouraging monogamy and faithfulness," "educating men and boys about the risks of procuring sex commercially," and "working to eliminate . . . the sexual exploitation of women and children," *id.* § 7611(a)(12)(A), (F), (J), Congress imposed two conditions on Leadership Act funds that are relevant to this case. First, Congress provided that no funds "may be used to promote or advocate the legaliza-

tion or practice of prostitution or sex trafficking." *Id.* § 7631(e). Second, Congress provided that

> [n]o funds . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

Id. § 7631(f) ("Policy Requirement"). In this way, Congress ensured not only that no Leadership Act funds would be used to promote prostitution, but also that its "funds go only to organizations that share the Act's disapproval of prostitution and sex trafficking." *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d 758, 760 (D.C. Cir. 2007).

Defendants the United States Department of Health and Human Services ("HHS") and the United States Agency for International Development ("USAID") ("Agencies") implemented the Policy Requirement by promulgating certain regulations and directives. The current rules require that Leadership Act recipients agree in public announcements of the receipt of funds, and in funding award documents, "that they are opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." HHS Organizational Integrity of Entities Implementing Programs & Activities Under the Leadership Act, 45 C.F.R. § 89.1 (2010); *see also* U.S. Agency for Int'l Dev., AAPD 05-04 Amendment 3, Implementation of the [eadership Act]—

Eligibility Limitation on the Use of Funds & Opposition to Prostitution & Sex Trafficking ¶ 2(A)(1), Attachment A (2010) [hereinafter USAID APPD]. The Agencies also promulgated organizational integrity guidelines and guidance ("Guidelines"), which allow a recipient of Leadership Act funds to maintain an affiliation with an organization that lacks the anti-prostitution policy required by 22 U.S.C. § 7631(f). The Guidelines require the recipient to "have objective integrity and independence" from any affiliate that "engages in activities inconsistent with the recipient's opposition to . . . prostitution." 45 C.F.R. § 89.3; *see also* USAID APPD ¶ 4(B). "Objective integrity and independence" will be found if the affiliate receives no transfer of Leadership Act funds from the recipient and the recipient "is, to the extent practicable in the circumstances, separate from the affiliated organization." 45 C.F.R. § 89.3(a)-(b); *see also* USAID APPD ¶ 4(B). "[S]ufficient separation" will be determined "on a case-by-case basis . . . based on the totality of the facts," including by examining five non-exclusive factors. 45 C.F.R. § 89.3(b); *see also* USAID APPD ¶ 4(B). The factors listed are: (1) legal separation of the affiliate, (2) "[t]he existence of separate personnel," (3) "[t]he existence of separate accounting and timekeeping records," (4) "[t]he degree of separation of . . . facilities," and (5) "[t]he extent to which signs and other forms of identification that distinguish the recipient from the affiliated organization are present." 45 C.F.R. § 89.3(b)(1)-(5); *see also* USAID APPD ¶ 4(B).

II

Plaintiffs' challenges to the Policy Requirement in this case are grounded in two substantive restrictions on government conduct imposed by the First Amendment:

the prohibition against compelled speech and the prohibition against viewpoint discrimination. Because the Policy Requirement is not a direct restriction on speech, but rather only a condition on the receipt of a federal subsidy, I analyze Plaintiffs' First Amendment challenges through the prism of the "unconstitutional conditions" doctrine as it has been applied in the government subsidy context. As background, I first discuss the underlying First Amendment substantive restrictions at issue and then the development of the "unconstitutional conditions" doctrine in the context of government subsidies.

A

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. There is no question that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); *see also Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996) (discussing constitutional right not to speak). In fact, the Supreme Court has suggested, without holding, that the government may be required to assert an even more compelling interest when it infringes the right to refrain from speaking than is required when it infringes the right to speak. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."). The Supreme Court has struck down govern-

ment attempts to directly compel school children to recite the Pledge of Allegiance on pain of expulsion from public school, *see id.* at 629, 63 S. Ct. 1178, or to compel drivers to bear a state's motto on their license plates on pain of a monetary fine, *see Wooley*, 430 U.S. at 714-17, 97 S. Ct. 1428. The Court also has invalidated a state's attempt to indirectly compel speech through the denial of an independent, already-existing tax exemption. *See Speiser v. Randall*, 357 U.S. 513, 518-19, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

The First Amendment also prohibits the government from directly regulating "speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). "In the realm of private speech or expression, government regulation may not favor one speaker over another." *Id.* "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* Viewpoint-based restrictions "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991). "The First Amendment presumptively places this sort of discrimination beyond the power of the government." *Id.*

B

When the government does not directly regulate speech, but only implicates First Amendment interests through conditions on federal spending, a different framework applies. The Spending Clause of the United States Constitution provides that "Congress shall have

Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. This provision allows Congress not only to provide federal subsidies to advance its policy goals, but also to "attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). Congress "has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Id.* (internal quotation marks omitted). For constitutional purposes, a federal subsidy program is fundamentally different from "direct state interference" with a particular activity. *See Maher v. Roe*, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977). "Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." *Id.* at 476, 97 S. Ct. 2376. As a result, "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998). Subsidy conditions, absent special circumstances, "cannot be subject to the least- or less-restrictive means mode of analysis—which, like the undue burden test . . . , is more appropriate for assessing the government's direct regulation of a fundamental right—when the government creates a federal spending program." *Brooklyn Legal Servs. v. Legal Servs. Corp.*, 462 F.3d 219, 229 (2d Cir.

2006), *cert. denied*, 552 U.S. 810, 128 S. Ct. 44, 169 L. Ed. 2d 11 (2007).

The government's power to impose conditions on federal subsidies is not unlimited. The "unconstitutional conditions" doctrine provides, in the First Amendment context, that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (internal quotation marks omitted) [hereinafter *FAIR*]; *see Perry v. Sindermann*, 408 U.S. 593, 597-98, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (reaffirming that the government may not terminate an employee based on the exercise of First Amendment rights because "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited"). The "unconstitutional conditions" doctrine does not, however, give rise to a constitutional claim in its own right; the condition must actually cause a violation of a substantive First Amendment right. *See FAIR*, 547 U.S. at 59-60, 126 S. Ct. 1297 (declining to address unconstitutional conditions issue because no underlying constitutional violation would arise from direct restriction); *cf.* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1427 (1989) (explaining that "constitutional interest at issue must rise to the level of a recognized right—indeed, a *preferred* right normally protected by strict judicial review"). The purpose of the "unconstitutional conditions" doctrine in the government subsidy context, therefore, is to provide

guidance on when a subsidy condition actually "infringes [a person's] . . . constitutionally protected . . . freedom of speech," *FAIR*, 547 U.S. at 59, 126 S. Ct. 1297. *See Regan v. Taxation With Representation*, 461 U.S. 540, 548, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) (explaining that heightened scrutiny is not required of all conditions on government funding or tax exemptions that merely "'*affect* [ ] First Amendment rights'" (quoting *Taxation With Representation v. Regan*, 676 F.2d 715, 728 (D.C. Cir. 1982)) (emphasis added in Supreme Court opinion)); *Speiser*, 357 U.S. at 518, 78 S. Ct. 1332 (noting that the denial of a tax exemption "may . . . infringe speech").

The "unconstitutional conditions" doctrine was applied in the context of a First Amendment challenge to the denial of a government benefit in *Speiser*. In that case, the State of California attempted to require veterans otherwise eligible for a property tax exemption to sign a loyalty oath stating that they did not advocate the violent overthrow of the government. The Supreme Court first observed that "[i]t is settled that speech can be effectively limited by the exercise of the taxing power. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Speiser*, 357 U.S. at 518, 78 S. Ct. 1332 (citation omitted). Therefore, the Court concluded that the fact that "a tax exemption is a 'privilege' or 'bounty'" does not mean that "its denial may not infringe speech." *Id.* at 518, 78 S. Ct. 1332. The Court explained that in *Speiser*, "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from

the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.'" *Id.* at 519, 78 S. Ct. 1332 (quoting *Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402, 70 S. Ct. 674, 94 L. Ed. 925 (1950)). Having characterized the condition as tantamount to a fine, the Court struck it down pursuant to the Due Process Clause of the Fourteenth Amendment for lacking sufficient procedural protections. *Id.* at 520-29, 78 S. Ct. 1332.

In *Taxation With Representation*, the Supreme Court was called on to apply *Speiser* in the context of a condition on nonprofit groups' ability to retain tax-favored status. Specifically, the Court addressed whether Congress's prohibition on lobbying by nonprofit organizations that were allowed to receive tax-deductible contributions amounted to an unconstitutional condition on the organizations' ability to receive tax-deductible money. *See Taxation With Representation*, 461 U.S. at 545, 103 S. Ct. 1997. While lobbying is clearly protected by the First Amendment, *see E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), the Court disagreed with the argument that the government had violated nonprofit groups' First Amendment rights by declining to "pay for the lobbying out of public monies," *Taxation With Representation*, 461 U.S. at 545, 103 S. Ct. 1997. The Court "reject[ed] the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.* at 546, 103 S. Ct. 1997 (quoting *Cammarano v. United States*, 358 U.S. 498, 515, 79 S. Ct. 524, 3 L. Ed. 2d 462 (1959) (Douglas, J., concurring)). The Court reasoned that the condition was valid because Congress did "not deny [plaintiff Taxation

With Representation ("TWR")] the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby." *Id.* Congress had not denied TWR the right to receive tax-deductible contributions to support non-lobbying activities because, despite Congress's restriction, the law allowed TWR to use a dual structure whereby TWR could continue to receive tax-deductible contributions to conduct non-lobbying activities while an affiliate organization could conduct any lobbying activities with non-deductible funds. *Id.* at 544, 103 S. Ct. 1997. The Supreme Court explained that, therefore, "Congress has not infringed any First Amendment rights or regulated any First Amendment activity[;] Congress has simply chosen not to pay for TWR's lobbying." *Id.* at 546, 103 S. Ct. 1997.

The Supreme Court also rejected the claim that Congress had violated TWR's constitutional rights by continuing to allow tax-exempt veterans' organizations to lobby with tax-deductible contributions. *Id.* at 546-47, 103 S. Ct. 1997. Congress was free to "select[] . . . particular entities or persons for entitlement to this sort of largesse [because the decision wa]s obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find." *Id.* at 549, 103 S. Ct. 1997 (internal quotation marks omitted). The Court cautioned, however, that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way 'to aim at the suppression of dangerous ideas.'" *Id.* at 548, 103 S. Ct. 1997 (some internal quotation marks omitted) (quoting *Cammarano*, 358 U.S. at 513, 79 S. Ct. 524, in turn quoting *Speiser*, 357 U.S. at 519, 78 S. Ct. 1332).

The Court found "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." *Id.* It also explicitly rejected the holding of the Court of Appeals below that "'strict scrutiny' is required because the statute '*affect[s]* First Amendment rights on a discriminatory basis.'" *Taxation With Representation*, 461 U.S. at 548, 103 S. Ct. 1997 (quoting *Taxation With Representation v. Regan*, 676 F.2d 715, 728 (D.C. Cir. 1982)) (alteration and emphasis added in Supreme Court opinion). The Supreme Court explained that it "is not the law" that "strict scrutiny applies whenever Congress subsidizes some speech, but not all speech." *Id.* Rather, "appropriations are comparable to tax exemptions and deductions, which are also a matter of grace [that] Congress can, of course, disallow . . . as it chooses." *Id.* at 549, 103 S. Ct. 1997 (internal quotation marks omitted). The Court emphasized again that "[w]here governmental provision of subsidies is not 'aimed at the suppression of dangerous ideas,' its 'power to encourage actions deemed to be in the public interest is necessarily far broader.'" *Id.* at 550, 103 S. Ct. 1997 (quoting *Cammarano*, 358 U.S. at 513, 79 S. Ct. 524, and *Maher*, 432 U.S. at 476, 97 S. Ct. 2376, respectively).

In a concurrence, Justice Blackmun, joined by Justices Brennan and Marshall, pointed out that Congress had in reality "not merely den[ied] a subsidy for lobbying activities" as the Court had suggested, it had prohibited an organization from receiving "tax-deductible contributions for all its activities, whenever one of those activities is 'substantial lobbying.'" *Id.* at 552, 103 S. Ct. 1997 (Blackmun, J., concurring). Justice Blackmun therefore urged that this restriction would in fact

"den[y] a significant benefit to organizations choosing to exercise their constitutional rights" and, as a result, would be an unconstitutional condition. *Id.* at 552 & n.*, 103 S. Ct. 1997. As support for this conclusion, Justice Blackmun cited, among other opinions, Justice Douglas's concurrence in *Cammarano*, which noted that while Congress's denial of a business-expense deduction for lobbying activities was constitutional, the denial of all business deductions for a taxpayer who lobbied, "would be placing a penalty on the exercise of First Amendment rights," *Cammarano*, 358 U.S. at 515, 79 S. Ct. 524 (Douglas, J., concurring) (cited in *Taxation With Representation*, 461 U.S. at 552 n.*, 103 S. Ct. 1997 (Blackmun, J., concurring)). Justice Blackmun's *Taxation With Representation* concurrence went on to explain that the lobbying restriction in that case was saved by the fact that a nonprofit organization could create an affiliate to "make known its views on legislation . . . without losing tax benefits for its nonlobbying activities." *Taxation With Representation*, 461 U.S. at 553, 103 S. Ct. 1997. Because of this dual structure, Justice Blackmun explained that "the Court finds that Congress' purpose in imposing the lobbying restriction was merely to ensure that 'no tax-deductible contributions are used to pay for substantial lobbying.'" *Id.* at 553, 103 S. Ct. 1997.

Taxation With Representation therefore expanded in two ways on *Speiser*'s initial discussion of the "unconstitutional conditions" doctrine as it applies to conditions on government benefits or subsidies that affect First Amendment rights. First, the Court noted that a funding condition would be unconstitutional if it operated as a coercive penalty on the exercise of First Amendment

rights. The Court suggested two ways that a government condition could do this: (1) if it restricted a recipient's First Amendment speech outside of the scope of the recipient's participation in the government program (for example, by restricting TWR from lobbying even with non-deductible contributions), or (2) if it denied government benefits to which the recipient would otherwise be entitled and that are independent from those provided by the government program at issue (for example, by denying a property tax exemption for failure to take a loyalty oath). *See id.* at 545, 103 S. Ct. 1997. Second, *Taxation With Representation* cautioned that when the purpose of a condition is not to define the boundaries of federal spending, but rather to suppress certain viewpoints, the condition may be unconstitutional. *See id.* at 548, 103 S. Ct. 1997. It is either as a coercive penalty or as viewpoint suppression, then, that the denial of a government benefit may "infringe [a person's] constitutionally protected ... freedom of speech even if he has no entitlement to that benefit," *FAIR*, 547 U.S. at 59, 126 S. Ct. 1297 (internal quotation marks omitted).

In the following two sections, I first address cases analyzing funding conditions as penalties on speech and then turn to cases discussing funding conditions alleged to impermissibly discriminate on the basis of viewpoint.

1

The term following its *Taxation With Representation* decision, the Supreme Court decided *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), which underlined the importance of the affiliate structure available in *Taxation With Representation*. In *League of Women Voters*, the Supreme

Court ruled that Congress's prohibition on editorializing by any noncommercial broadcast station that received a federal grant was not "sufficiently limited . . . to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects." *Id.* at 402, 104 S. Ct. 3106. By denying federal grants to stations that editorialized, Congress had not merely refused to subsidize editorializing by public broadcasting stations, but rather it had caused a "station that receives only 1% of its overall income from [federal] grants [to be] barred absolutely from all editorializing." *Id.* at 400, 104 S. Ct. 3106. "The station ha[d] no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it [wa]s barred from using even wholly private funds to finance its editorial activity." *Id.* The Court explicitly noted, however, that if Congress maintained the restriction but allowed broadcast stations to establish affiliate organizations to editorialize with nonfederal money, "such a statutory mechanism would plainly be valid under the reasoning of *Taxation With Representation.*" *Id.* The Court in *League of Women Voters*, therefore, as both the *Taxation With Representation* Court, 461 U.S. at 544-46, 103 S. Ct. 1997, and Justice Blackmun concurring in that case, *id.* at 552-53, 103 S. Ct. 1997, had suggested, concluded that a federal funding condition that not only limited the scope of the government program, but that also denied a recipient the right to spend private money in support of protected First Amendment activities, went too far.

In *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the Supreme Court applied the "unconstitutional conditions" doctrine in the context of

a subsidy program that appropriated grants to healthcare organizations to operate family planning projects. Congress conditioned the grants with the restriction that none of the federal funds were to be "'used in programs where abortion is a method of family planning,'" *id.* at 178, 111 S. Ct. 1759 (quoting 42 U.S.C. § 300a-6). The Supreme Court upheld agency regulations preventing federally funded projects from providing abortion counseling or "engaging in activities that 'encourage, promote or advocate abortion as a method of family planning.'" *Id.* at 180, 111 S. Ct. 1759 (quoting 42 C.F.R. § 59.10(a) (1989)). The Court ruled that the regulations did "not force the . . . grantee to give up abortion-related speech; they merely require[d] that the grantee keep such activities separate and distinct from [government-funded] activities." *Id.* at 196, 111 S. Ct. 1759. When the government simply "insist[s] that public funds be spent for the purposes for which they were authorized," "the [g]overnment is not denying a benefit to anyone" and there is no unconstitutional penalty on free speech. *Id.* The Court noted that the regulations in *Rust* continued to allow healthcare organizations to advocate for abortion; they "simply [were] required to conduct those activities through programs that [were] separate and independent from the project that receives [federal] funds." *Id.* In this way, the regulations in *Rust* were like those in *Taxation With Representation* that allowed for protected lobbying to continue with non-deductible contributions, and unlike those in *League of Women Voters* that prohibited stations from editorializing even with private funds. *See id.* at 197-98, 111 S. Ct. 1759. The *Rust* Court explained that

> [b]y requiring that the [federal program] grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and [*Taxation With Representation*], not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the [federally funded] project in order to ensure the integrity of the federally funded program.

Id. at 198, 111 S. Ct. 1759; *see also Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 766 (2d Cir. 1999) [hereinafter *Velazquez I*] (explaining that the restriction in *Rust* "was limited to speech at odds with the values Congress was seeking to advance through its grant program"), *aff'd*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001).

Finally, in *United States v. American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003), the Supreme Court upheld a law that denied public libraries funding to provide Internet access unless the libraries installed software to block access to obscenity and child pornography and to prevent children from accessing inappropriate material.[1] The plurality opinion rejected the argument that the law imposed an unconstitutional condition on the receipt of federal funding because it "penaliz[ed] a library for failing to install filtering software on every one of its Internet-accessible computers." *Id.* at 212, 123 S. Ct. 2297 (quoting *id.* at 226,

[1] The judgment of the Court was announced in an opinion by Chief Justice Rehnquist and joined by three other Justices. Two other Justices concurred in the judgment and each filed their own opinions.

123 S. Ct. 2297 (Stevens, J., dissenting)). The plurality explained that the law

> does not "penalize" libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, [the law] simply reflects Congress' decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance. A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.

Id. (some internal quotation marks omitted). The plurality also expressly distinguished cases that "involved true penalties, such as denial of a promotion or outright discharge from employment," from "nonsubsidies," like the one at issue in *American Library Ass'n. Id.* at 212 n. 6, 123 S. Ct. 2297.

In this way, *American Library Ass'n* was precisely in line with *Speiser, Taxation With Representation, League of Women Voters*, and *Rust*. When acting pursuant to its Spending Clause powers, Congress may attach conditions to federal subsidies that have the effect of limiting recipients' First Amendment rights, as long as the conditions do not limit free speech outside of the scope of the government program and do not deny independent benefits to which recipients are otherwise entitled in an attempt to penalize First Amendment activity. Even when funding conditions limit or affect speech, such limits are generally permissible if they are meant only to ensure that government funds are used for the purposes for which they were authorized. This is because, absent special circumstances, there is no coercive

force behind a funding condition that is truly cabined to the federal subsidy program to which it is attached. If potential recipients do not wish to abide by the condition, they can simply choose not to accept the funds. *See Am. Library Ass'n*, 539 U.S. at 212, 123 S. Ct. 2297 ("To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance."); *Rust*, 500 U.S. at 199, 111 S. Ct. 1759 ("[T]his limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."); *id.* at 199 n.5, 111 S. Ct. 1759 ("[S]ubsidies are just that, subsidies. The recipient is in no way compelled to operate a [federally funded] project; it can simply decline the subsidy."); *Grove City College v. Bell*, 465 U.S. 555, 575, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984) ("Grove City may terminate its participation in the [federal] program and thus avoid the requirements of [the condition]."); *cf. Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, __ U.S. __, 130 S. Ct. 2971, 2986, 177 L. Ed. 2d 838 (2010) ("[Plaintiff] in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies."); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 586, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983) (plurality opinion) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt."); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 27, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981) (explaining that "legislation enacted pursuant to the spending power is much in the nature of a contract; in return for federal funds, the [re-

cipient] States agree to comply with federally imposed conditions" and concluding that "the court below failed to recognize the well-settled distinction between congressional 'encouragement' of state programs and the imposition of binding obligations on the States"). This is why it is usually the case that "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Velazquez I*, 164 F.3d at 766; *accord Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 231 (2d Cir. 2006), *cert. denied*, 552 U.S. 810, 128 S. Ct. 44, 169 L. Ed. 2d 11 (2007). When adequate alternative channels are available, any restrictions on protected First Amendment activity imposed within the scope of the federal program only apply to that federally funded program and therefore are not the equivalent of direct restrictions or "true penalties," *Am. Library Ass'n*, 539 U.S. at 212 n. 6, 123 S. Ct. 2297. *See Brooklyn Legal Servs.*, 462 F.3d at 231; *Velazquez I*, 164 F.3d at 766.

2

Speiser and *Taxation With Representation* also emphasize that funding conditions may be unconstitutional if they "discriminate invidiously . . . in such a way as to 'aim at the suppression of dangerous ideas,'" *Regan v. Taxation With Representation*, 461 U.S. 540, 550, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) (quoting *Cammarano*, 358 U.S. at 513, 79 S. Ct. 524). The Supreme Court and this Court have addressed claims that funding conditions impermissibly discriminate on the basis of viewpoint in *Rust*, *Rosenberger*, *Finley*, the *Velazquez* cases, and *American Library Ass'n*.

In *Rust*, recipients of the family planning grants argued that the regulations restricting federal funds from being used for abortion services constituted impermissible viewpoint discrimination in favor of an anti-abortion position. 500 U.S. at 192, 111 S. Ct. 1759. Relying on *Taxation With Representation*, they argued that because the government "continue[d] to fund speech ancillary to pregnancy testing in a manner that is not even-handed with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint." *Id.* (internal quotation marks omitted). The Supreme Court rejected this challenge and found that Congress had not discriminated in favor of an anti-abortion position, but had "merely chosen to fund one activity to the exclusion of the other." *Id.* at 193, 111 S. Ct. 1759. The Court reiterated that "'[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.'" *Id.* (quoting *Maher v. Roe*, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977)). In other words, *Rust* was "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope," *id.* at 194, 111 S. Ct. 1759. This was so even though it cannot be denied that the scope of the government-funded project in *Rust* necessarily limited recipients' ability to advocate a pro-abortion viewpoint within the scope of the government program.[2]

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[2] While the *Rust* Court explained that "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other," 500 U.S. at 193, 111 S. Ct. 1759, that may have been another way of stating the conclusion that the government had not *impermissibly* discriminated on the basis of viewpoint.

The Court applied *Rust* in the context of the provision of public-university funds to student groups in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). In that case, the University of Virginia denied funding from its Student Activities Fund to a student organization that wished to publish a newspaper that advocated Christian viewpoints. The Supreme Court analogized the Student Activities Fund to creating a "metaphysical" limited public forum for student speech. *Id.* at 829-30, 115 S. Ct. 2510. The Court explained that once the State "has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by

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Cf. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) [hereinafter *Velazquez I*] ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under [the federal program] amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding."); *Velazquez I*, 164 F.3d at 770 ("[W]e doubt that these words [in *Rust*] can reliably be taken at face value."). The regulations at issue in *Rust* did, in fact, prohibit a particular position on abortion. *See Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043 ("We have said that viewpoint-based funding decisions can be sustained in instances . . . like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.' " (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995))); *Rust*, 500 U.S. at 209, 111 S. Ct. 1759 (Blackmun, J., dissenting) ("The regulations are also clearly viewpoint based."); *id.* at 210, 111 S. Ct. 1759 (quoting the agency regulation stating that a project "may not *encourage, promote or advocate* abortion" (emphasis added in *Rust*)); *see also* Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151, 170 (1996) ("The [*Rust*] regulations plainly discriminate on the basis of viewpoint. . . . ").

the forum, nor may it discriminate against speech on the basis of its viewpoint." *Id.* at 829, 115 S. Ct. 2510 (internal citations and quotation marks omitted). The Supreme Court rejected the University's attempt to rely on *Rust* for the proposition that it could make content-based funding decisions when necessary to accomplish its educational mission. *Id.* at 832-33, 115 S. Ct. 2510. In so doing, the Court acknowledged that it was true that "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.* at 833, 115 S. Ct. 2510. The Court pointed to *Rust* as a case where

> the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

Id. (internal citations omitted). The Court explained, however, that it had never held that "viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 834, 115 S. Ct. 2510. In sum, because the University offered funds to student groups specifically to "encourage a diversity of views from private speakers" and intended to facilitate

the speech of private "speakers who convey their own messages," the University could not, having created a quasi-limited public forum for student speech, then "silence the expression of selected viewpoints." *Id.* at 834-35, 115 S. Ct. 2510.

The Court had an opportunity to further explain *Rosenberger* in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998). In that case, Congress directed the National Endowment for the Arts ("NEA") to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in determining whether to award federal grants to artists. *Id.* at 572, 118 S. Ct. 2168. Performance artists who were denied funding claimed that the funding condition constituted viewpoint discrimination against art that offended standards of decency or did not respect mainstream values. *Id.* at 580, 118 S. Ct. 2168. The Supreme Court rejected this challenge and concluded that Congress's restriction would not "give rise to the suppression of protected expression." *Id.* at 585, 118 S. Ct. 2168. In so doing, the Supreme Court distinguished the nature of the program at issue in *Finley* with that in *Rosenberger*. The Supreme Court explained that in *Rosenberger*, the government "indiscriminately 'encourage[d] a diversity of views from private speakers.'" *Id.* at 586, 118 S. Ct. 2168 (quoting *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510). In *Finley*, on the other hand, the NEA was mandated to "make esthetic judgments" that were "inherently content based." *Id.* The purpose of the program, therefore, set the NEA subsidy "apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations . . . and from comparably objective

decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, or the second class mailing privileges available to all newspapers and other periodical publications" at issue in other cases where viewpoint discrimination was found impermissible. *Id.* (internal citations and quotation marks omitted). The Supreme Court reiterated its warning that, nevertheless, the government may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints," and may not aim at the suppression of dangerous ideas. *Id.* at 587, 118 S. Ct. 2168. Having found no evidence of such suppression, however, the logic of *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), applied: The government was free to "allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 587-88, 118 S. Ct. 2168 (relying in part on *Rust*, 500 U.S. at 193, 111 S. Ct. 1759); *accord Brooklyn Legal Servs.*, 462 F.3d at 230 ("[T]he government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech at stake.").

Our Court was called on to apply these cases in *Velazquez I*, 164 F.3d 757 (2d Cir. 1999). In that case, lawyers employed by grantees of the Legal Services Corporation ("LSC")[3] challenged a law that barred LSC funds from being used to perform various activities, in-

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[3] The LSC is "a non-profit government-funded corporation, created by [an Act of Congress], for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." *Id.* at 759 (internal citation and quotation marks omitted).

cluding lobbying, participating in class actions, seeking attorneys' fees, or seeking to reform or challenge existing welfare laws. We first analyzed *Taxation With Representation, FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), and *Rust* and summarized those cases as providing that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Velazquez I*, 164 F.3d at 766. We upheld all of the restrictions at issue from a facial challenge that they burdened the recipients' ability to use private funds to engage in First Amendment protected activity. *Id.* at 765-67. We relied on the teaching of *Taxation With Representation* and *League of Women Voters* (and the fact that "*Rust* is consistent with these cases") that subsidy restrictions are acceptable if there are "adequate alternative avenues for expression through affiliates." *Id.* at 766-67. We left for a future case, ultimately *Brooklyn Legal Services*, 462 F.3d at 219, 222-23, the question whether the alternatives provided under the LSC program were in fact adequate in the context of an as-applied challenge. *See infra* at 263.

In *Velazquez I*, we also upheld almost all of the restrictions against a viewpoint discrimination challenge because we found that they were in fact viewpoint neutral. 164 F.3d at 767-69. However, we concluded that the limitation that precluded a lawyer who received LSC funds from challenging an existing welfare rule in a suit on behalf of a client for welfare benefits was not viewpoint neutral. We noted that the restriction "clearly seeks to discourage challenges to the status quo." *Id.* at

770. The majority declined to follow then-Judge Jacobs's view, concurring in part and dissenting in part, that whether viewpoint discrimination was permissible in the context of the proviso at issue turned on whether the government, through funding the LSC, sought to promote a diversity of private views as it had done in *Rosenberger*. *See id.* at 775-77 (Jacobs, J., concurring in part, dissenting in part) (arguing additionally that the proviso was viewpoint neutral). Judge Jacobs concluded that the LSC program was not created to fund a diversity of private views and that when the government does not "create[] a limited public forum for the expression of diverse viewpoints," *id.* at 774, "the principle[]explicitly announced in *Rust* and not implicated by the facts of *Rosenberger* "applies: "[W]hen the government funds specific services it deems to be in the public interest, it may require grantees to get with its program," *id.* at 776. The majority, on the other hand, reasoned that *Rust* 's conclusion that the government in that case had "not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other," *Rust*, 500 U.S. at 193, 111 S. Ct. 1759, could not "reliably be taken at face value," *Velazquez I*, 164 F.3d at 770. Instead of adopting Judge Jacobs's framework, the majority focused on the type of speech at issue, noting that criticism of government policy garners the strongest First Amendment protection. *Id.* at 771. Because the majority found that a lawyer's argument that a welfare statute is invalid was closer to criticism of official policy than to the type of speech at issue in cases where the Supreme Court had rejected viewpoint discrimination challenges (abortion counseling in *Rust* and indecent art in *Finley*), it held that the restriction on

challenging welfare laws was subject to strict First Amendment scrutiny. *Id.* at 771-72.

Granting certiorari in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) [hereinafter *Velazquez II*], the Supreme Court appeared generally to endorse Judge Jacobs's framework for comparing the LSC restrictions with the restrictions at issue in *Rust* and *Rosenberger*, although it disagreed with Judge Jacobs's conclusion that the LSC program was more like the former than the latter. The Supreme Court explained that while the *Rust* Court "did not place explicit reliance on the rationale that counseling services of the doctors under Title X amounted to governmental speech . . . we have explained *Rust* on this understanding." *Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043. The Court therefore noted that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.'" *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043 (internal citation omitted) (quoting *Rosenberger*, 515 U.S. at 833, 115 S. Ct. 2510). The Court contrasted those cases with a situation in which the government "'does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.'" *Id.* at 542, 121 S. Ct. 1043 (quoting *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510). In the latter case, "'it does not follow . . . that viewpoint-based restrictions are proper.'" *Id.* (quoting *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510) (omission in *Velazquez II*). The Court acknowledged that the LSC program was different from the Stu-

dent Activities Fund at issue in *Rosenberger* because the LSC program did not seek to "encourage a diversity of views," but concluded that "the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message." *Id.* at 542, 121 S. Ct. 1043. The private nature of the speech facilitated was underlined by the fact that the government sought "to use an existing medium of expression"—the lawyer—client relationship—"and to control it, in a class of cases, in ways which distort its usual functioning." *Id.* at 543, 121 S. Ct. 1043.

The *Velazquez II* Court also rejected the government's argument that the restriction on suits challenging welfare laws was "necessary to define the scope and contours of the federal program" and "help[ ] the current welfare system function in a more efficient and fair manner by removing from the program complex challenges to existing welfare laws." *Id.* at 547, 121 S. Ct. 1043. The Court ruled that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Id.* The Court explained that "in the context of this statute, there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives." *Id.* at 548, 121 S. Ct. 1043. In ultimately holding the restriction invalid, the Court emphasized that "[w]here private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* at 548-49, 121 S. Ct. 1043 (citing *Regan v. Tax-*

ation With Representation, 461 U.S. 540, 548, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), and *Speiser v. Randall*, 357 U.S. 513, 519, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958)).

Finally, in *United States v. American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003), a plurality of the Court explicitly rejected the argument that *Velazquez II* limited *Rust* to cases "'in which the government seeks to communicate a specific message.'" *Id.* at 213 n. 7, 123 S. Ct. 2297 (quoting *id.* at 228, 123 S. Ct. 2297 (Stevens, J., dissenting)). Dissenting, Justice Stevens relied on *Velazquez II* to argue that the condition requiring public libraries to install filtering software was an attempt to "distort[] th[e] medium" of "Internet-accessible computers." *Id.* at 227-28, 123 S. Ct. 2297. Justice Stevens rejected the *American Library Ass'n* plurality's assertion that *Rust* allowed Congress to restrict the scope of its own subsidy programs by arguing that "*Rust* only involved, and only applies to, instances of governmental speech—that is, situations in which the government seeks to communicate a specific message." *Id.* at 228, 123 S. Ct. 2297. The plurality, however, explained that "*Velazquez* held only that viewpoint-based restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead expends funds to encourage a diversity of views from private speakers*,'" *id.* at 213 n. 7, 123 S. Ct. 2297 (quoting *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043) (emphasis added in *American Library Ass'n*). The plurality reasoned that *Velazquez II* did not apply in *American Library Ass'n* because "public libraries do not install Internet terminals to provide a forum for Web publishers to express

themselves, but rather to provide patrons with online material of requisite and appropriate quality." *Id.*

III

In this case, the majority concludes that the Policy Requirement "warrants heightened scrutiny" because it is a "bold combination in a funding condition of a speech-targeted restriction that is both affirmative and quintessentially viewpoint-based." Maj. Op. at 236. However, the Policy Requirement is a permissible funding condition under the "unconstitutional conditions" doctrine as it has been applied in the government subsidy context because it neither imposes a penalty on protected First Amendment rights nor discriminates in a way aimed at the suppression of ideas. Furthermore, the viewpoint-based nature of the Policy Requirement is entirely proper because no public forum principles are implicated in this case.

A

Although it is obvious, it must be noted at the outset that the Policy Requirement does not actually compel anyone to speak the government's favored viewpoint. The Policy Requirement is a condition on the voluntary receipt of Leadership Act funds—funds which are available only to groups that wish to participate in the government's "global strateg[y] to combat HIV/AIDS," 22 U.S.C. § 7603(1). The Supreme Court has explained that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977); *see also Taxation With Representation*, 461 U.S. at 550, 103 S. Ct. 1997 ("Although

TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." (internal quotation marks omitted)); *id.* at 549, 103 S. Ct. 1997 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."); *id.* (noting that government appropriations, like tax deductions, are "a matter of grace [that] Congress can, of course, disallow . . . as it chooses" (internal quotation marks omitted)). "In diverse contexts, [the Supreme Court's] decisions have distinguished between policies that require action and those that withhold benefits." *Christian Legal Soc'y v. Martinez*, ___ U.S. ___, 130 S. Ct. 2971, 2986, 177 L. Ed. 2d 838 (2010); *see also Am. Library Ass'n*, 539 U.S. at 212 n.6, 123 S. Ct. 2297 (distinguishing "true penalties" from "nonsubsidies"); *ACORN v. United States*, 618 F.3d 125, 137 (2d Cir. 2010) (noting that for purposes of determining whether a law constitutes punishment in violation of the Bill of Attainder Clause "the plaintiffs are not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities"), *cert. denied*, ___ U.S. ___, 131 S. Ct. 3026, 180 L. Ed. 2d 865, 2011 WL 704331 (2011). In seeking to partner with organizations that oppose prostitution, Congress "is dangling the carrot of subsidy, not wielding the stick of prohibition." *Christian Legal Soc'y*, 130 S. Ct. at 2986. Plaintiffs' speech is not compelled because if Plaintiffs do not wish to ascribe to the Policy Requirement, they may simply chose not to seek Leadership Act funds. The Supreme Court has repeatedly concluded that a subsidy, temptation, or motive provided by the

government is not, except in special circumstances, coercive and may simply be declined by any potential recipient. *See* cases cited *supra* at 248-49. "[S]ilence, or neutrality" is, in fact, "an option for Plaintiffs." *See* Maj. Op. at 234.

Of course, *Speiser* and its progeny teach that, in some instances, the denial of a government benefit can have the same "deterrent effect" on free speech as the direct regulation of speech. *See Speiser*, 357 U.S. at 518, 78 S. Ct. 1332. The "unconstitutional conditions" doctrine provides the framework for analyzing when the denial of a government benefit rises to the level of an infringement on free speech. Despite engaging in a thorough discussion of "unconstitutional conditions" cases in the government subsidy context, the majority puts that doctrine aside and appears to conclude that when a funding condition imposes an affirmative rather than negative speech requirement, it always "raise[s] serious First Amendment concerns," Maj. Op. at 234. As support for this proposition, the majority offers two pieces of evidence. First, the majority observes that *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), *Speiser*, and *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), were compelled speech cases where heightened scrutiny was applied or where the restrictions at issue were otherwise struck down. Second, the majority points to one sentence in *FAIR*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006), that it believes suggests that affirmative-speech funding conditions "push[ ] beyond," Maj. Op. at 234 n. 3, what the First Amendment allows.

First, as the majority recognizes, *Barnette*, *Speiser*, and *Wooley* are not cases where the government sought to appropriate public funds and then limit the scope of the subsidy program. *Wooley* and *Barnette* have traditionally been described as cases of the government's attempt to compel speech through the direct force of law. *See, e.g., Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005) (describing *Barnette* as a case of "outright compulsion of speech"). While those cases can be creatively recast, as the majority does, to be, along with *Speiser*, cases about conditions placed on the governmental benefits of "going to school" (*Barnette*) and "using the roads" (*Wooley*), the government's attempt to deny the benefits in those cases was quite different from the Policy Requirement at issue here. In *Barnette* and *Wooley*, the only alternatives to accepting the government's benefits would be not to go to public school or not drive on the public roads, respectively. The government, therefore, used its monopoly power over public education and the public roads to put recipients to a choice that was obviously coercive—there was no realistic alternative to accepting the conditions and giving up First Amendment rights. *See Frost v. R.R. Comm'n*, 271 U.S. 583, 593, 46 S. Ct. 605, 70 L. Ed. 1101 (1926) (explaining that the choice of whether to use the public highways or submit to a burden on constitutional rights gave the plaintiff "no choice, except a choice between the rock and the whirlpool"). In this case, Plaintiffs do not argue that Leadership Act funds are vital to their continued survival or even that they are the only source of funds to fight HIV/AIDS. *Cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 596-97, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (Scalia, J., concurring in the judgment)

(viewing skeptically the potential argument that the denial of an entirely voluntary subsidy may constitute coercion equivalent to a direct compulsion to speak if it were the only source of a recipient's funding). Moreover, in *Barnette*, *Speiser*, and *Wooley*, the threatened denial of a so called government benefit turned on requiring the recipient to speak a message that was unrelated to the government benefit at issue. The government in those cases threatened the denial of an existing benefit (going to school, a property tax exemption, and using the roads, respectively) as a means of coercing recipients to give up First Amendment rights. The restrictions in *Barnette*, *Speiser*, and *Wooley* were not merely attempts to confine government spending to the scope of a subsidy program, of course, because there was no relevant subsidy program at all in those cases. *Cf. Taxation With Representation*, 461 U.S. at 545, 103 S. Ct. 1997 ("But TWR is just as certainly incorrect when it claims that this case fits the *Speiser-Perry* model."). Therefore, the actual purposes of the government regulations were revealed and they were properly found invalid.

It is difficult to understand what relevance these cases can have to determining whether a true government subsidy condition is constitutional. *Speiser*, and particularly *Barnette* and *Wooley*, only provide the underlying substantive basis for Plaintiffs' compelled speech claims in this case, just as in *Taxation With Representation*, for example, the underlying substantive doctrine provided that Congress would violate the First Amendment if it directly restricted the right to lobby, *see id.*, 461 U.S. at 552, 103 S. Ct. 1997 (Blackmun, J., concurring) (citing *E.R.R. Presidents Conference v.*

Noerr Motor Freight, Inc., 365 U.S. 127, 137-38, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), for the proposition that lobbying is a protected activity). The existence of an underlying substantive First Amendment prohibition, however, did not resolve the constitutionality of the condition at issue in *Taxation With Representation;* nor does it here. Rather, this case calls on us to determine whether, despite Congress's broad power to impose conditions on federal spending, a funding condition that imposes an affirmative speech requirement is so coercive as to equal a direct compulsion of speech. The majority need not struggle from a blank slate with determining the proper way to approach this question. The Supreme Court has already provided the framework for us in *Taxation with Representation*, *Rust*, and the entire line of cases applying the "unconstitutional conditions" doctrine in the government subsidies context.

None of those cases turned on whether the alleged speech restriction was affirmative or negative.[4] Rather, the foundational principle of *Taxation With Representation* and *Rust* is that the government is allowed to "insist[ ] that public funds be spent for the purposes for which they were authorized," *Rust v. Sullivan*, 500 U.S.

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[4] The majority is certainly correct to note that none of the unconstitutional conditions cases even involved an affirmative speech condition. Maj. Op. at 234 n. 3. It is the intersection of those two doctrines that provides the novel constitutional question before us. The point remains, however, that there has never been a suggestion that the mere existence of a particular type of substantive First Amendment concern should control whether a government funding condition is unconstitutional. That is because "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977).

173, 196, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). The Policy Requirement in this case does precisely that. Congress determined that as part of fighting "the spread of the HIV/AIDS epidemic," "it should be the policy of the United States to eradicate" "[p]rostitution." 22 U.S.C. § 7601(23). It also determined that it desired to fight HIV/AIDS specifically through a strategy of "reduc[ing] HIV/AIDS behavioral risks" and "eliminat[ing] . . . the sexual exploitation of women and children." *Id.* § 7611(a)(12), (a)(12)(J). It therefore only authorized federal funds for organizations that shared its desire to affirmatively reduce HIV/AIDS behavioral risks, including its policy of eradicating prostitution. As a means to this end, the Agencies require recipients to affirm in funding award documents that they are in fact opposed to prostitution. The Policy Requirement is therefore precisely aimed at Congress's goal. Congress did not determine in the Leadership Act that it wished to fight HIV/AIDS through a strategy of remaining neutral on the issue of prostitution and other behavioral risks that contribute to the HIV/AIDS epidemic and that it would implement that strategy by simply withholding funding from groups that support prostitution, *cf. id.* § 7631(e). Rather, it specifically wanted to "eradicate" prostitution and other behavioral risks. *Id.* § 7601(23). While in *Rust*, Congress wished to *not* fund abortion activities through its family planning grants, here Congress sought to eradicate prostitution and decided to affirmatively fund only groups that shared its particular approach to fighting HIV/AIDS. It is perfectly within Congress's Spending Clause powers to craft a condition that "insist[s] that public funds be spent for the purposes for which they were authorized," *Rust*, 500 U.S. at 196, 111 S. Ct. 1759.

The second reason the majority concludes that affirmative speech requirements always "raise serious First Amendment concerns," Maj. Op. at 234, is *FAIR*'s statement that "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse," *FAIR*, 547 U.S. at 61, 126 S. Ct. 1297. In *FAIR*, various law schools challenged Congress's decision to withhold federal grants from educational institutions that denied military recruiters access equal to that of other recruiters. *Id.* at 51, 126 S. Ct. 1297. The Supreme Court did not engage in an "unconstitutional conditions" analysis because it concluded that "the First Amendment would not prevent Congress from directly imposing the . . . access requirement" on universities in any event. *See id.* at 59-60, 126 S. Ct. 1297 (declining to "determine when a condition placed on university funding goes beyond the reasonable choice offered in *Grove City* and becomes an unconstitutional condition" (internal quotation marks omitted)). In that context, the Supreme Court addressed the law schools' argument that the access requirement constituted compelled speech because the schools were forced, if they sent e-mails and posted notices regarding other campus recruiters, to do the same for military recruiters. *Id.* at 61-62, 126 S. Ct. 1297. The Supreme Court set out the compelled-speech doctrine pursuant to *Barnette* and *Wooley* and concluded that "recruiting assistance . . . is a far cry from the compelled speech in *Barnette* and *Wooley*." *Id.* at 62, 126 S. Ct. 1297. The Court explained that Congress's restriction "does not dictate the content of the speech at all. . . . There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." *Id.* The Court therefore found that a necessary but not sufficient ele-

ment of an unconstitutional funding condition was absent—there would be no underlying First Amendment violation if the condition was applied directly. The Court had no need to address whether a funding condition that required recipients to espouse a particular message would be constitutional under the First Amendment and said nothing about that issue. *FAIR*, therefore, has little relevance to the key issue in this case for the same reason that *Barnette*, *Speiser*, and *Wooley* are not determinative: There is a basic difference between the denial of government funding and a direct compulsion to speak.

B

Because there is a doctrine that precisely addresses whether a government subsidy condition is constitutional pursuant to the First Amendment, I would apply it here. The Policy Requirement imposes neither of the two types of burdens identified in *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), as penalizing free speech such that a subsidy condition approaches the coercive effects of a direct restriction. First, the Policy Requirement does not deny any independent government benefit to which Plaintiffs are otherwise entitled. The only consequence if Plaintiffs do not subscribe to the Leadership Act's Policy Requirement is that they will not receive Leadership Act funds. This is unlike *Speiser* (and *Barnette* and *Wooley* if re-characterized as government-funding cases) where the denial of independent, already-existing benefits was threatened. It is also unlike the denial of all business deductions for a taxpayer who lobbied contemplated in Justice Douglas's concurrence in *Cammarano v. United States*, 358 U.S. 498, 515, 79 S. Ct.

524, 3 L. Ed. 2d 462 (1959), as "a penalty on the exercise of First Amendment rights." The only government benefit at risk is the subsidy that the government chose to restrict in order to achieve its policy goals.

The Policy Requirement also does not restrict Plaintiffs' First Amendment speech outside of the scope of the Leadership Act program. This is because the organizational integrity guidelines implemented by the Agencies allow for exactly the affiliate structure that saved the funding conditions at issue in *Taxation With Representation* and *Velazquez I* and was found missing in *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984). In this case, Plaintiffs may create affiliate organizations to receive Leadership Act funds and comply with the Leadership Act's Policy Requirement. Plaintiffs, therefore, are free to continue to remain silent or to espouse a pro-prostitution message with non-Leadership Act funds. In this way, the Policy Requirement coupled with the Guidelines only ensures that Leadership Act funds are spent within the scope of the government program—that is, on organizations that share Congress's desire to "eradicate" the practice of "[p]rostitution and other sexual victimization" because they "are additional causes of and factors in the spread of the HIV/AIDS epidemic," 22 U.S.C. § 7601(23). The Policy Requirement and Guidelines therefore impose no penalty on Plaintiffs' First Amendment rights.

The majority rejects the argument that the Guidelines save the Policy Requirement from infringing Plaintiffs' right to refrain from speaking. The majority explains that in previous cases, affiliate provisions like the Guidelines provided an "*outlet* " that allowed organiza-

tions to say what was otherwise "impermissibly prohibited" by federal subsidy programs. Maj. Op. at 259 (citing *Taxation With Representation* and *League of Women Voters*). The majority argues that this case is different because an "adequate alternative channel" cannot remedy a compelled speech condition "by affording an outlet to engage in privately funded *silence*." Maj. Op. at 239. This logic misses the point of "adequate alternative channels" in the government subsidy context and again fails to account for the fact that the Policy Requirement is merely a subsidy condition, not a mandate to speak.[5] Provisions allowing recipients of government funding to establish affiliate organizations to either receive the government funds or to operate exclusively with private funds are important because they remedy one way that a funding condition, although merely a funding condition, could be so coercive as to rise to the level of a direct restriction on speech. Affili-

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[5] It is true that we have explained that "[t]aking [*Taxation With Representation*, *League of Women Voters*, and *Rust*] together, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected *expression*." *Velazquez I*, 164 F.3d at 766 (emphasis added); *accord Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 231 (2d Cir. 2006), *cert. denied*, 552 U.S. 810, 128 S. Ct. 44, 169 L. Ed. 2d 11 (2007). The cases we summarized, however, all dealt with subsidy conditions that imposed negative restrictions on speech and therefore it is no surprise that the dual-structures contemplated were thought of as "adequate alternative channels" for restricted speech rather than for the right to refrain from speaking. In this case, it may be that it does not make sense to think of the Guidelines as providing an "outlet to engage in privately funded *silence*," Maj. Op. at 239, but that does not affect whether affiliate provisions, like the Guidelines, prevent subsidy conditions, like the Policy Requirement, from amounting to penalties on First Amendment rights. I see no reason why an affirmative-speech subsidy condition should be treated differently.

ate structures prevent subsidy conditions from reaching beyond the scope of the subsidy program and restricting what an organization may or may not say outside of the scope of the program. It is in this way that subsidy conditions could become penalties on First Amendment rights equivalent to a direct restriction. *See Taxation With Representation*, 461 U.S. at 545, 103 S. Ct. 1997 ("The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity. . . . Congress has merely refused to pay for the lobbying out of public monies.").

For the reasons explained above, the fact that an affirmative speech condition rather than a negative speech condition is at issue here does not change the analysis of whether a subsidy condition rises to the level of a direct regulation of a constitutional right. *See* discussion *supra* at 254-58. Moreover, a direct restriction on speech is just as offensive to the First Amendment as is a direct compulsion to speak, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance. . . . "), *see also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 481, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997) (Souter, J., dissenting) ("[C]ompelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny."), and funding conditions that implicate these principles should be subject to the same analysis.[6]

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[6] While it is true that dicta in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34, 63 S. Ct. 1178, 87 L. Ed. 1628

This is why the District Court's dismissal of any saving effect of the Guidelines in this case because "the clause requiring Plaintiffs to adopt the Government's view regarding . . . prostitution remains intact," *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 570 F. Supp. 2d 533, 545 (S.D.N.Y. 2008) [hereinafter *AOSI*], and, in turn, the majority's quotation of that sentence, is inexplicable. So too is the majority's assertion that "there remains, on top of [the Guidelines], the additional, affirmative requirement that the recipient entity pledge its opposition to prostitution." Maj. Op. at 239. It bears repeating: The Policy Requirement together with the Guidelines do not *require* Plaintiffs or affiliates to adopt the government's viewpoint regarding prostitution or to say anything. The Policy Requirement is a funding condition and it must be analyzed pursuant to the cases addressing "unconstitutional conditions" on government subsidies. Applying those cases, the Policy Requirement and the Guidelines do not penalize or coerce First Amendment protected conduct and do not compel speech outside of the scope of the government program. For all of these reasons, the Policy Requirement is not subject to heightened First Amendment scrutiny.

(1943), suggests that once the government is found to have compelled speech, it may be required to offer "even more immediate and urgent grounds" than when it restricts speech, that case does not speak to determining when a funding condition actually compels speech. The level of interest the government must demonstrate is only relevant once an infringement of First Amendment rights is demonstrated. The question in this case is whether the funding condition actually infringes First Amendment rights in the first instance; I would hold that it does not.

While the majority does not address the issue, Plaintiffs additionally argue that the Guidelines do not in fact provide an adequate alternative channel for protected First Amendment activity because they are too burdensome in practice. The District Court below addressed this challenge, although it did so in error by reviewing the Guidelines under heightened scrutiny. *Id.* at 548-9. We have explained that heightened scrutiny or an "undue burden" test does not apply to the question whether alternative channels like those at issue here are in fact adequate on an as-applied challenge. *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 230-32 (2d Cir. 2006), *cert. denied*, 552 U.S. 810, 128 S. Ct. 44, 169 L. Ed. 2d 11 (2007). Rather, the proper question is whether any burdens on plaintiffs under the organizational integrity guidelines "in effect preclude the plaintiffs from establishing an affiliate. If so, the alternative channels are inadequate, and the plaintiffs may prevail on their as-applied challenge." *Id.* at 233. Because I would vacate the preliminary injunction and remand this case to the District Court, Plaintiffs would be free to raise any as-applied challenge to the Guidelines under the proper *Brooklyn Legal Services* standard at that time.

C

After concluding that the affirmative nature of the Policy Requirement "raises serious First Amendment concerns," the majority ultimately asserts that heightened scrutiny applies in this case because of the "bold combination" of an affirmative-speech requirement that is also viewpoint-based. Maj. Op. at 234-35, 235-36. For the reasons explained above, nothing about the affirmative nature of the Policy Requirement requires height-

ened scrutiny to apply. Likewise, contrary to the majority's suggestion, viewpoint-based funding conditions are not inherently "constitutionally troublesome," Maj. Op. at 235, and the viewpoint-based nature of the funding condition at issue in this case does not warrant heightened scrutiny.

Funding conditions that discriminate on the basis of viewpoint are only subject to heightened scrutiny (1) when they are "aimed at the suppression of dangerous ideas," *Speiser v. Randall*, 357 U.S. 513, 519, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (internal quotation marks omitted), or (2) when they are imposed in the context of a program designed to encourage a diversity of views or to facilitate private speech in a quasi-public forum context, *see Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510, *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043. These classes of cases are not unrelated. The presence of viewpoint discrimination in the context of a government program that has no policy objective other than funding private speech tends to demonstrate that any attached viewpoint-based condition is primarily intended to influence behavior or to suppress certain ideas rather than to achieve a legitimate objective or to promote a government message. However, "when a spending program is not universal but limited, providing benefits to a restricted number of recipients" (as is the case here and in *Rust*), and when that program "does not create a public forum, proving coercion is virtually impossible, because simply denying a subsidy does not coerce belief, and because the criterion of unconstitutionality is whether denial of the subsidy threatens to drive certain ideas or viewpoints from the marketplace." *Velazquez II*, 531

U.S. at 552, 121 S. Ct. 1043 (Scalia, J., dissenting) (internal quotation marks and citation omitted).

First, Plaintiffs do not urge, and the majority correctly does not conclude, that the Policy Requirement is aimed at the suppression of any dangerous ideas. There is simply no evidence that Congress's purpose in enacting the Leadership Act and attaching the Policy Requirement was to suppress pro-prostitution views (or even neutrality on the issue). Congress could hardly have thought the best way to suppress support for prostitution in the public discourse would be to offer federal funds to a narrow range of groups that wished to combat HIV/AIDS, but only if they espoused an anti-prostitution position. Both the purpose and effects of the Policy Requirement are a far cry from those cases where the government condition was clearly aimed at the suppression or compulsion of speech qua speech. *See, e.g., Grosjean v. Am. Press Co.*, 297 U.S. 233, 250, 56 S. Ct. 444, 80 L. Ed. 660 (1936) ("[The tax] is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information."); *see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 579-80, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983) (discussing *Grosjean*); *Speiser*, 357 U.S. at 518, 78 S. Ct. 1332. Rather, the Policy Requirement is aimed at achieving Congress's legitimate goal of eradicating prostitution and reducing behavioral risks as a technique of fighting HIV/AIDS. Moreover, the organizational integrity guidelines leave Plaintiffs with precisely the same ability to remain silent or speak a pro-prostitution message if they choose. The Policy Requirement and Guidelines therefore in no way silence

government criticism or contrary views on prostitution and HIV/AIDS. Only affiliates that voluntarily choose to accept Leadership Act funds must oppose prostitution; Plaintiffs and all other speakers are free to speak their own messages, including messages contradictory to those of separate affiliate groups.

With regard to the second category of cases, the Supreme Court "has recognized that the existence of a Government subsidy, in the form of Government-owned property, does not justify the restriction of speech in areas that have been traditionally open to the public for expressive activity." *Rust v. Sullivan*, 500 U.S. 173, 199-200, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (internal quotation marks omitted). *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), and *Velazquez II* extended this principle to conclude that viewpoint discrimination is improper not only in traditional public fora, but also in cases where the government essentially creates a limited public forum by "offer[ing] to pay . . . private speakers who convey their own messages," *Rosenberger*, 515 U.S. at 835, 115 S. Ct. 2510. Once the government has offered to pay private speakers to speak their own messages, the government may not discriminate "against speech otherwise within the forum's limitations." *Id.* at 830, 115 S. Ct. 2510. One example of a subsidy program that pays private speakers but does not create a limited public forum is a program in which the government " 'use[s] private speakers to transmit specific information pertaining to its own program,'" *Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043 (quoting *Rosenberger*, 515 U.S. at 833, 115 S. Ct. 2510), or "subsidize[s] transmittal of a message it favors," *Rosen-*

berger, 515 U.S. at 834, 115 S. Ct. 2510. In any event, however, the "salient point" in the Supreme Court's analysis of those programs in which viewpoint discrimination has been found improper is that those programs were "designed to facilitate private speech." *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043; *see also United States v. Am. Library Ass'n*, 539 U.S. 194, 213 n.7, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) (plurality opinion) (explaining that *Rust* does not only apply when the government seeks to communicate a specific message).

In this case, it is plain that the government does not seek to "encourage a diversity of views from private speakers," as it did in *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510, by offering to reimburse student groups for newspaper publication costs. The purpose of the Leadership Act is not to fund a variety of non-governmental organizations interested in fighting HIV/AIDS, each of whom might have a different viewpoint on prostitution and sex trafficking. On the contrary, the Leadership Act specifically seeks to advance an anti-prostitution, anti-sex-trafficking approach to combating HIV/AIDS. *See* 22 U.S.C. §§ 7601(23), 7611(a)(12). In enacting the Leadership Act, Congress made an inherently viewpoint-based judgment concerning the allocation of public resources for fighting HIV/AIDS, which sets the program "apart from the subsidy at issue in *Rosenberger* . . . and from comparably objective decisions on allocating public benefits," *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998), at issue in cases where viewpoint discrimination was found invalid. In other words, public forum principles do not apply in this case because Congress did not authorize Leadership Act funds "in order

to create a public forum for [Plaintiffs] to express themselves," *Am. Library Ass'n*, 539 U.S. at 206, 123 S. Ct. 2297 (ruling that public forum principles do not apply because "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves"), but rather to achieve particular policy goals.

Likewise, the purpose of the Leadership Act is not to generally "facilitate private speech," as was the purpose of the LSC program in the *Velazquez* cases. In those cases, "Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients." *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043. The LSC program was "not advancing any particular set of values that might be diluted or distorted," *Velazquez I*, 164 F.3d at 766, by the grantee-lawyers' speech or decision not to speak. Indeed, the LSC lawyer's role specifically was to speak against the government in court in a claim for welfare benefits—the speech was "on the behalf of [the lawyer's] private, indigent client" and inherently not on behalf of the government. *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043. Therefore the case was distinguishable from *Rust* because, with regard to the LSC program, "there [was] no programmatic message of the kind recognized in *Rust*." *Id.* at 548, 121 S. Ct. 1043. Here, on the contrary, instead of generally facilitating private speech, the purpose of the Leadership Act program is to combat HIV/AIDS in a particular way. The government has chosen to fund a method of combating HIV/AIDS that includes its private partners taking an anti-prostitution, anti-sex-trafficking position to the exclusion of an alternative program that would allow grantees to remain silent on the issue or to speak a pro-

prostitution message. Unlike in the *Velazquez* cases, the government's "set of values" and strategy of combating HIV/AIDS would be weakened, "diluted or distorted," *Velazquez I*, 164 F.3d at 766, if its partners were allowed to speak a pro-prostitution, pro-sex-trafficking message or to stay silent on the issue. No matter how vehemently Plaintiffs may disagree with the government's policy towards prostitution and HIV/AIDS, Congress decided that part of its anti-HIV/AIDS strategy was to "eradicate prostitution," 22 U.S.C. § 7601(23). In this case, like *Rust*, the government is allowed to specify its grantees' position on prostitution "deemed necessary for its legitimate objective[ ]," *Velazquez II*, 531 U.S. at 548, 121 S. Ct. 1043, of reducing HIV/AIDS.

The majority rejects *Rust*'s application here because it believes the Policy Requirement "compels Plaintiffs to voice the government's viewpoint . . . as if it were their own," Maj. Op. at 237. First, it must be reiterated that the Policy Requirement does not compel any speech. *See* discussion *supra* at 254-58. Second, just as with the cases addressing whether subsidy conditions are coercive, none of the cases addressing allegedly viewpoint-discriminatory subsidy conditions have turned on whether an affirmative or negative speech requirement was at issue. Rather, the "salient point" for viewpoint-discrimination analysis is whether the government has effectively created a limited public forum. In this case, the government's program is not designed to "encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510, nor is it intended to facilitate private speech, *Velazquez II*, 531 U.S. at 544, 121 S. Ct. 1043. And "viewpoint-based funding decisions can be sustained in instances in which the government

. . . 'use[s] private speakers to transmit specific information pertaining to its own program.'" *Id.* at 541, 121 S. Ct. 1043 (internal citation omitted) (quoting *Rosenberger*, 515 U.S. at 833, 115 S. Ct. 2510).

The majority's only additional professed rationale for casting *Rust* and its progeny aside is that the *Rust* Court stated that "[n]othing in [the challenged regulations] requires a doctor to represent as his own any opinion that he does not in fact hold" and noted that "[t]he doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program," *Rust v. Sullivan*, 500 U.S. 173, 200, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). However, this observation came only in the *Rust* Court's consideration of the claim by the plaintiffs in that case that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government," *id.* at 200, 111 S. Ct. 1759, an issue the Court did not reach. Instead, the Court concluded that because the doctors in *Rust* were not required to state any opinion that they did not hold and could simply say that abortion advice was outside of the scope of the program, the regulations did "not significantly impinge upon the doctor-patient relationship." *Id.* In this case, there is no such traditional relationship that should enjoy extra First Amendment protection, nor would any relationship as sensitive as the doctor-patient relationship be impinged if a recipient of Leadership Act funds did not actually oppose prostitution and sex trafficking, but said it did in order to receive government funding. The majority's own example of a situation in which it believes an affirmative speech requirement would be permitted sug-

gests that the risk that a recipient would be tempted to state an opinion it did not hold—in other words, to lie—to receive government funding does not invalidate a government subsidy condition. The majority "do[es] not doubt" that the government could require grantees of a "Just Say No" to drugs program to state that they oppose drug use by children. Maj. Op. at 237. But what about potential grantees who do not actually oppose drug use by children, but are tempted by the offer of funds? It cannot be that their constitutional rights are violated because as a condition of receiving federal money, they must "voice the government's viewpoint and . . . do so as if it were their own." Maj. Op. at 237.

Despite all of this, the majority concedes that the government may impose an affirmative, viewpoint-based funding condition if "the government's program *is,* in effect, its message," or, perhaps, if the message is "central" to the program. Maj. Op. at 238-39, 239. The majority, however, concludes that because the "stated purpose of the Leadership Act is to *fight HIV/AIDS,* as well as tuberculosis, and malaria[,] Defendants cannot now recast the Leadership Act's global HIV/AIDS-prevention program as an anti-prostitution messaging campaign." Maj. Op. at 238 (footnote omitted). True enough. *See Velazquez II,* 531 U.S. at 547, 121 S. Ct. 1043 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."). But this case is not like *Velazquez II* where the Supreme Court found that there was "no programmatic message of the kind recognized in *Rust,*" *id.* at 548, 121 S. Ct. 1043, that would support restricting lawyers' First Amendment rights. In this case, the government is not

attempting to recast a program that was meant to merely provide funds to allow private speakers to speak their own messages into a program that could support the Policy Requirement. Rather, the Policy Requirement is obviously related to substantive policy goals of the Leadership Act—goals beyond, and different from, simply subsidizing private speech for its own sake. *See* 22 U.S.C. § 7601(23) ("Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices."); *id.* § 7611(a)(12), (a)(12)(J) (directing that the President's strategy to fight HIV/AIDS shall "make the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts by . . . eliminat[ing] . . . the sexual exploitation of women and children"). This is not a case where the funding condition is so attenuated from the purpose for which the public funds were appropriated as to invalidate the condition. *Compare South Dakota v. Dole*, 483 U.S. 203, 207-08, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (concluding that while "conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs," "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel" (internal quotation marks omitted)) *with id.* at 213-14, 107 S. Ct. 2793 (O'Connor, J., dissenting) ("In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.").

Moreover, the majority cites no support for its implication that the purpose of the Leadership Act must be

examined at the broadest possible level of generality to determine whether public-forum principles apply to this case. *See* Maj. Op. at 236-37("The stated purpose of the Leadership Act is to *fight HIV/AIDS*, as well as tuberculosis, and malaria." (footnote omitted)). There is no reason why a government subsidy program must actually *be* a messaging campaign or even have a message as a "central" component in order to support a viewpoint discriminatory condition that is germane to legitimate substantive goals of the program. *Rust*, *Rosenberger*, and *Velazquez II* did not address the size of, number of purposes of, or any potential "subsidiary issue[s]," Maj. Op. at 238, in the government programs in which those cases suggested that viewpoint discriminatory conditions would be permissible.

The majority also questions the Leadership Act's commitment to partnering with groups that oppose prostitution as a means of combating HIV/AIDS because the Policy Requirement specifically exempts four groups from compliance: the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and United Nations agencies, *see* 22 U.S.C. § 7631(f). One of these organizations, the International AIDS Vaccine Initiative, is focused on the development of an AIDS vaccine. The fact that Congress determined that while it generally only wished to partner with groups that opposed prostitution, it nevertheless wanted to fund research for an AIDS vaccine does not call into question Congress's desire to eradicate prostitution as part of its efforts to combat HIV/AIDS. Congress may simply have determined that AIDS-vaccine research was an even more important priority. The three remaining groups are

"public international organizations" in which the United States participates and which are made up primarily or exclusively of sovereign states. *See generally id.* § 288 (discussing "public international organizations"). Again, nothing about the fact that Congress chose to make Leadership Act funds available to these international organizations without requiring them to comply with the Policy Requirement undermines Congress's strong desire to only partner with groups that share its opposition to prostitution. Congress may have determined that the goals of the Policy Requirement were outweighed by sensitive diplomatic considerations. The majority suggests that if Congress truly wished to support "anti-prostitution advocacy . . . it could, of course, simply choose not to fund these organizations." Maj. Op. at 238. But the decision whether to withhold Leadership Act funds from these organizations or instead to provide an exemption from the Policy Requirement is precisely the kind of policy judgment that Congress, not the courts, is entitled to make. *Cf. Regan v. Taxation With Representation*, 461 U.S. 540, 549, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) ("Congressional selection of particular entities or persons for entitlement to this sort of largesse is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find." (internal quotation marks omitted)).

Finally, the majority relies on the fact that "prostitution in the context of the international HIV/AIDS-prevention effort[ ] is a subject of international debate" and notes that it concerns a "controversial public issue," to argue that Plaintiffs' speech rights are important. Maj. Op. at 236-37 & n.4. The majority also rejects Defen-

dants' argument that strict scrutiny should not apply to the Policy Requirement because it implicates foreign affairs. But the substantive validity or controversial nature of Plaintiffs' position on prostitution and any foreign affairs repercussions for the government both are not determinative of whether the Policy Requirement is constitutional pursuant to the "unconstitutional conditions" doctrine and the viewpoint-discrimination cases discussed above. Because I conclude that the Policy Requirement is not subject to heightened scrutiny in any event, I need not reach these arguments. Nevertheless, I believe my observations sufficiently dispose of them.

For all of the reasons explained above, I conclude that the Policy Requirement's viewpoint-based nature is permissible in this case and that it is not subject to heightened judicial scrutiny.

IV

"A plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). We review a district court's grant of a preliminary injunction for abuse of discretion. *Alleyne v. N.Y. State Educ. Dep't*, 516 F.3d 96, 100 (2d Cir. 2008). "A district court abuses its discretion when (1) its decision rests on an error of law. . . . " *Mullins v. City of New York*, 626 F.3d 47, 51 (2d Cir. 2010) (internal quotation marks omitted). The District Court in this case granted Plaintiffs' request for a preliminary injunction because it con-

cluded that the Policy Requirement "would not survive heightened scrutiny, and also impermissibly compel[s] speech" and therefore it "violate[s] the First Amendment." *AOSI*, 570 F. Supp. 2d 533, 549 (S.D.N.Y. 2008). For the reasons explained above, I conclude that the District Court erred because the Policy Requirement is not subject to heightened scrutiny, does not compel speech, and does not violate the First Amendment. Furthermore, because Congress's decision to enact the Policy Requirement is an entirely rational exercise of its powers pursuant to the Spending Clause, I would conclude that Plaintiffs have not established a likelihood of succeeding on the merits of their claim that the Policy Requirement is unconstitutional. Accordingly, I would vacate the preliminary injunction and remand the case for any further proceedings consistent with my views.[7]

* * *

With today's decision, the majority unnecessarily splits from the Court of Appeals for the District of Columbia Circuit on this very issue. In 2007, the D.C. Circuit Court of Appeals rejected an almost identical challenge to the Leadership Act by a potential grantee that refused to adopt a policy opposing prostitution. *See DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d

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[7] The District Court did not reach Plaintiffs' vagueness claims because the Court granted the preliminary injunction on the grounds that the Policy Requirement and Guidelines violated the First Amendment because they "would not survive heightened scrutiny, and also impermissibly compel speech," *AOSI*, 570 F. Supp. 2d at 549. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976). Because the majority also does not reach Plaintiffs' vagueness challenge, I do not pass upon it here.

758 (D.C. Cir. 2007). The Court explained that the Act's viewpoint-based restrictions were permissible because "the government has not created a program to encourage private speech," as it did in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), and *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), but rather, "as in *Rust*, the government's own message is being delivered." *DKT Int'l*, 477 F.3d at 762 (internal quotation marks omitted). While the organizational integrity guidelines were not yet in place when *DKT International* was decided, the Court also rejected the plaintiff's argument that, pursuant to *Rust*, funding restrictions may only apply to particular projects and not to recipients in general. The Court explained that there was no constitutional violation in the Leadership Act because "[n]othing prevents [the plaintiff] from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution. . . . The parent organization need not adopt the policy." *Id.* at 763. Finally, the Court also rejected the plaintiff's compelled speech challenge, distinguishing *Barnette*, *Speiser*, and *Wooley* from the case before it:

> In each of those cases, the penalty for refusing to propagate the message was denial of an already-existing public benefit. None involved the government's selective funding of organizations best equipped to communicate its message. Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message

> on pain of losing their public education, *Barnette*, 319 U.S. at 629, 63 S. Ct. 1178, or access to public roads, *Wooley*, 430 U.S. at 715, 97 S. Ct. 1428.

DKT Int'l, 477 F.3d at 762 n. 2.

Furthermore, and as explained above, I believe that the "unconstitutional conditions" doctrine and the cases addressing viewpoint discrimination in the government subsidy context provide the appropriate framework for analyzing this case. I conclude that those cases demonstrate that the Policy Requirement is constitutional. Nevertheless, it has been said that the "unconstitutional conditions" doctrine is a "troubled area of [Supreme Court] jurisprudence," *Rust*, 500 U.S. at 205, 111 S. Ct. 1759, and that the Supreme Court's unconstitutional conditions cases "seem a minefield to be traversed gingerly," Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415-16 (1989). Because the majority today, however, does more to further complicate the doctrine than to clarify it, the Supreme Court may wish to grant certiorari to set us straight.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-4917-cv

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL, INTERACTION, PLAINTIFFS-APPELLEES, OPEN SOCIETY INSTITUTE, PLAINTIFF

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, RAJIV SHAH,* IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, AND HIS SUCCESSORS, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, THOMAS R. FRIEDEN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, AND HIS SUCCESSORS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND HER SUCCESSORS, DEFENDANTS-APPELLANTS

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* Named officials have been substituted for their predecessors pursuant to Fed. R. App. P. 43(c)(2).

Argued: Dec. 9, 2010
Decided: July 6, 2011
Opinion on Rehearing: Feb. 2, 2012

ORDER

ROSEMARY S. POOLER, Circuit Judge, concurs by opinion from the denial of rehearing en Banc. JOSÉ A. CABRANES, Circuit Judge, joined by REENA RAGGI and DEBRA ANN LIVINGSTON, Circuit Judges, dissents by opinion from the denial of rehearing en banc.

Following disposition of this appeal on July 6, 2011, Defendants-Appellants United States Agency for International Development, et al., filed a petition for rehearing en banc. A poll of the active members of the Court having been conducted, and there being no majority favoring en banc review, rehearing en banc is hereby **DENIED.**

JOSÉ A. CABRANES, Circuit Judge, with whom Judge RAGGI and Judge LIVINGSTON join, dissenting from the denial of rehearing en banc:

I respectfully dissent from the decision of the Court to deny rehearing *en banc* in this case. The question presented is indisputably one of exceptional importance. It is also one that has divided the Courts of Appeals.

In appropriating billions of dollars to combat the global HIV/AIDS epidemic, Congress found that "[p]rostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex in-

dustry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. § 7601(23). It thus required, among other things, that in order to receive funds under this law, organizations must have "a policy explicitly opposing prostitution and sex trafficking." *Id.* § 7631(f). This is an uncomplicated and commonsensical condition of federal funding—but a divided panel of our Court has affirmed an injunction forbidding its enforcement.

Despite Congress's broad powers under the Spending Clause,[1] the panel majority in this case held that requiring organizations that accept federal program funds to have a policy consistent with a clearly-stated purpose of that funding program "infringes" the freedom of speech guaranteed by the First Amendment. The decision of the panel majority, which diverges from that of our sister circuit in the District of Columbia, is based on a newly uncovered constitutional distinction between "affirmative" and "negative" speech restrictions. *See Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 239 (2d Cir. 2011). Presented with the opportunity to restore uniformity in

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[1] The Spending Clause of the Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Incident to the Spending Clause power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980)).

the enforcement of a federal statute by rehearing the case *en banc*, a majority of this Court voted to avoid doing so. I dissent from that decision.[2]

I.

The statute at issue is the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (the "Leadership Act"), 22 U.S.C. § 7601 *et seq.*, which provides $48 billion in taxpayer funds to combat the global HIV/AIDS epidemic,[3] *id.* § 7671(a), and includes an explicit congressional finding that "[p]rostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices," *id.* § 7601(23). In keeping

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[2] In her opinion concurring in the denial of *en banc* review, Judge Pooler asserts that this opinion "adds little to Judge Straub's dissent from the panel's opinion." Pooler, J., Op. Concurring in Denial of Reh'g *En Banc*, at 131 ("Pooler Op."). Maybe so—but the purpose of this opinion is not to propose a new theory of dissent, but to suggest that the reasons already articulated form a compelling basis for *en banc* review. Indeed, if the controlling body of law is as "complicated," "contentious," "messy," and "unsettled," as Judge Pooler claims, *id.* at 132, that assessment favors careful *en banc* review of an opinion—by a divided panel—that affirms an injunction of federal legislation.

Judge Pooler would have us believe that *en banc* review "would occasion a monumental expenditure of the time and resources of our Court," with "little prospect of resolving any of the current doctrinal disarray." *Id.* at 132. In her view, the daunting task of "tackl[ing]" the question presented is apparently beyond the "willing[ness]" and "ab[ility]" of the *en banc* court of the Second Circuit. *Id.* at 133. Instead, Judge Pooler would prefer "the Supreme Court's attention." *Id.* So be it.

[3] The original statute authorized $3 billion for each of the fiscal years 2004 through 2008; the current version, which was reauthorized and amended in 2008, authorizes $48 billion for the five-year period beginning October 1, 2008.

with that finding, Congress imposed two relevant conditions on the use of Leadership Act funds: that (1) "no funds . . . may be used to promote or advocate the legalization or practice of prostitution or sex trafficking," *id.* § 7631(e); and (2) with specified exceptions, "[n]o funds . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking," *id.* § 7631(f). The latter provision, known as the "policy requirement," forms the subject of this appeal.

The panel decision in this case characterized the policy requirement as "impermissibly compelling Plaintiffs to espouse the government's viewpoint on prostitution." *Alliance for Open Soc'y*, 651 F.3d at 230. Based substantially on the "affirmative" nature of the policy requirement, the panel declared that "[i]t is this bold combination in a funding condition of a speech-targeted restriction that is both affirmative and quintessentially viewpoint-based that warrants heightened scrutiny." *Id.* at 236. Having applied "heightened scrutiny," the panel of course concluded that the plaintiffs had demonstrated a likelihood of success on the merits of their First Amendment challenge and therefore affirmed the preliminary injunction. *Id.* at 239.

Notwithstanding the language of compulsion that riddles the majority opinion, it bears noting that the policy requirement does not actually "mandate," "compel," or "require" the plaintiffs to say anything at all. *Id.* at 223, 228, 230, 234-39. Rather, the policy requirement is simply "a condition on the voluntary receipt of Leadership Act funds," *id.* at 254 (Straub, J., dissenting), and the plaintiffs remain at liberty "to avoid the force of the regulations" by "simply declin[ing] the sub-

sidy," *Rust v. Sullivan*, 500 U.S. 173, 199 n.5, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). As Judge Straub observed in a lengthy and careful dissent, "[t]here is a basic difference between the denial of government funding and a direct compulsion to speak." *Alliance for Open Soc'y*, 651 F.3d at 258 (Straub, J., dissenting).

It is well established that the unconstitutional conditions doctrine provides the jurisprudential framework for analyzing government subsidy conditions. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). Although the majority engaged in a detailed discussion of the unconstitutional conditions cases, the panel decision does not rest on the unconstitutional conditions jurisprudence. Professing that the doctrine does not "neatly" capture this case, *Alliance for Open Soc'y*, 651 F.3d at 234 n.3, the majority instead relied on a purported distinction between affirmative and negative speech restrictions, *id.* at 234 ("[W]here, as here, the government seeks to affirmatively require government-preferred speech, its efforts raise serious First Amendment concerns."). But no unconstitutional conditions case has ever turned on such a distinction.[4] Indeed, in the context of protected speech, the Supreme Court has held that the "difference between compelled speech and compelled silence" is "without constitutional significance." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

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[4] The majority implicitly acknowledges the novelty of this constitutional question by noting that "none of those [unconstitutional conditions] cases involved an affirmative speech restriction." *Alliance for Open Soc'y*, 651 F.3d at 235 n.3 (emphasis omitted).

The panel decision thus presents the exceptionally important question of whether, despite Congress's broad powers under the Spending Clause, a funding condition that imposes an affirmative speech requirement "infringes" constitutionally protected speech. *See Forum for Academic & Institutional Rights*, 547 U.S. at 59, 126 S. Ct. 1297 (internal citation and quotation marks omitted). Although the majority has vigorously denied "put[ting] . . . aside" the unconstitutional conditions doctrine in answering that question with respect to the policy requirement, *id.* at 234 n.3, it is clear that the disposition of this case turns not on the existing jurisprudential framework, but on an affirmative-negative paradigm of the panel's own invention.

In so holding, the panel decision "splits" from the District of Columbia Circuit, which rejected a nearly identical challenge to the Leadership Act by another grantee that refused to adopt a policy opposing prostitution. *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d 758 (D.C.Cir. 2007). That circuit, writing prior to the amendment of the Agency Guidelines, explained that the funding condition was permissible because "the government has not created a program to encourage private speech"—rather, "the government's own message is being delivered." *Id.* at 762 (internal citations and quotation marks omitted). Our sister circuit concluded that the Leadership Act "does not compel [the plaintiff] to advocate the government's position on prostitution and sex trafficking; it requires only that if [the plaintiff] wishes to receive funds it must communicate the message the government chooses to fund. This does not violate the First Amendment." *Id.* at 764.

By reaching the opposite conclusion with respect to the constitutionality of the funding condition, the divided Second Circuit panel has created a "circuit split," so that, as the government's petition for rehearing *en banc* observes, the statute is enforceable in some jurisdictions but not in others. *See* Pet. for Rehearing 1. This is another reason why the panel decision indisputably raises a "question[ ] of exceptional importance." Fed. R. App. P. 35(b)(1)(B) ("[A] petition [for rehearing *en banc*] may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of the other United States Courts of Appeals that have addressed the issue.").

II.

One possible argument for voting against rehearing this case is a theory that *en banc* review of a preliminary injunction is inappropriate, and that we should stay our consideration of these issues for a further appeal—one that will purportedly follow a final determination on the merits. The Supreme Court has, it is true, instructed that "[i]f the underlying constitutional question is close, . . . we should uphold the injunction and remand for trial on the merits," *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664-65, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). But the majority opinion makes no reference to a "remand for trial on the merits," *id.* at 665, 124 S. Ct. 2783, and contains no decretal language to that effect. The District Court docket sheet, which was closed for administrative purposes on July 29, 2009, offers little insight as to what further proceedings, if any, are contemplated below. In the months prior to the filing of this appeal, the District Court threatened to "dismiss

this action without further notice for lack of prosecution." *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, No. 05 Civ. 8209, Doc. No. 93 (S.D.N.Y.). The last substantive entry on the District Court docket sheet is a letter from the plaintiffs dated January 6, 2010, informing the District Court of their expectation that, "following resolution of the appeal, it will be necessary to determine, at that time, *whether* to prosecute the action further in the District Court." *Id.*, Doc. No. 98 (emphasis added). On these facts, I submit that it is by no means certain that this case will return to us a third time.[5]

In any event, it is unclear how further development of the record would affect, much less alter, the decision of the panel majority that the policy requirement "falls well beyond what the Supreme Court and this Court have upheld as permissible conditions on the receipt of government funds." *Alliance for Open Soc'y*, 651 F.3d at 223.

CONCLUSION

Because this case presents a question of exceptional importance regarding the interaction of the unconstitutional conditions doctrine with an affirmative speech

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[5] Judge Pooler catechistically asserts that there will be a live and continuing controversy in the District Court following the resolution of this appeal. Indeed, we are told that any suggestion to the contrary "is simply untrue," since "[a] preliminary injunction is just that—preliminary," Pooler Op. at 134, and "[o]nce the mandate issues, it is incumbent upon the district court to revive the litigation," *id.* at 134. Whether she is right on this score remains to be seen. Much will depend upon the readiness *vel non* of the district judge to continue to pursue legal questions on which, he might well think, he has already received the authoritative instructions of the Court of Appeals.

restriction, and because that question implicates the uniform application of a federal statute, I respectfully dissent from the denial of rehearing *en banc.*

ROSEMARY S. POOLER, Circuit Judge, concurring in the denial of rehearing en banc:

I respectfully concur in the denial of the rehearing en banc. I write in response to the dissent from the denial of rehearing en banc, which adds little to Judge Straub's dissent from the panel's opinion. *Compare Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 255 (2d Cir. 2011) ("*Alliance*") (Straub, *J.*, dissenting) (declaring that "the majority puts [the unconstitutional conditions] doctrine aside and appears to conclude that when a funding condition imposes an affirmative rather than negative speech requirement, it always raises serious First Amendment concerns") (quotation marks and alteration omitted), *with* Cabranes, *J.*, Op. Dissenting from Denial of Reh'g En Banc at 5489 (announcing that it is "clear" that "the disposition of this case turns not on the existing jurisprudential framework, but on an affirmative-negative paradigm of the panel's own invention").

The en banc dissent oversimplifies a complicated and contentious body of law. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415-17 (1989) (describing the unconstitutional conditions doctrine as "riven with inconsistencies," "a minefield to be traversed gingerly," and in a state of "doctrinal disarray"); Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151, 175 (1996) ("[T]here is at present no well-developed doctrine setting forth the exact test to be used to evaluate viewpoint discriminatory regulations [like those at

issue in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)]"). What can be gleaned from a careful parsing of the case law is that the level of scrutiny applied to Government subsidies under the unconstitutional conditions doctrine turns on the type and scope of speech required or restricted, the speaker, whether the condition is viewpoint-discriminatory, its relationship to the Government program at issue, and other fact-specific inquiries. *See, e.g., United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) ("*Velazquez II*"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984); *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006) ("*BLS*"); *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757 (2d Cir. 1999) ("*Velazquez I*").

According to the dissent, plaintiffs' First Amendment claims may swiftly be rejected because they "remain at liberty 'to avoid the force of the regulations' by 'simply declin[ing] the subsidy.'" En banc dissent at 5487 (quoting *Rust*, 500 U.S. at 199 n.5, 111 S. Ct. 1759). Respectfully, and as detailed in the panel opinion, such an assertion is refuted by a careful reading of *Velazquez II*, *Rust*, *League of Women Voters*, *Regan*, *BLS*, and *Velazquez I*. The unconstitutional conditions doctrine is

messy and unsettled—so much so that the Government itself has changed its position on the question of whether the funding condition at issue is constitutional.

Nor is it surprising that our decision created a circuit split. The dissent argues that split is reason to rehear this case en banc. *See* En banc dissent at 5490. To the contrary, such an exercise would occasion a monumental expenditure of the time and resources of our Court, on an incomplete record, with precious little prospect of resolving any of the current doctrinal disarray. An *en banc* court would force us to wade into and inevitably clash over doctrines frequently in tension, including those for categorizing speakers;[1] testing the fit between a viewpoint-discriminatory regulation in the context of a "government program" against the scope of, and message advanced by, that program;[2] determining when

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[1] *See* Post at 169 ("The doctrine of unconstitutional conditions . . . lacks any mechanism for determining the domain to which speech should be allocated and hence for adequately describing the nature of the 'rights' that are to be protected."); *compare Velazquez II*, 531 U.S. at 542-43, 121 S. Ct. 1043 ("The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."), *with id.* at 554, 121 S. Ct. 1043 (Scalia, *J.*, dissenting) ("If the private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech. . . . Even respondents agree that the true speaker in *Rust* was not the government, but a doctor.") (internal quotation marks omitted) (emphasis in original).

[2] *Compare Rust*, 500 U.S. at 194, 195 n.4, 111 S. Ct. 1759 (describing prohibition on abortion counseling as condition of funding for family planning services as "a prohibition on a project grantee or its employees from engaging in *activities outside of the project's scope*" that was "*narrowly tailored* to fit Congress' intent in Title X that federal funds not be used to 'promote or advocate' abortion as a 'method of family

regulations penalizing the use of private funds must permit alternative channels for constitutionally-protected expression;[3] and assessing whether program integrity guidelines purportedly designed to provide such channels are, on their face, inadequate.[4] Even if we were

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planning' ") (emphasis added), *and Velazquez I*, 164 F.3d at 766 ("Without diminishing its potential importance to some grantees, the speech restriction in *Rust* was nonetheless very narrow."), *with Velazquez II*, 531 U.S. at 548, 121 S. Ct. 1043 ("[I]n the context of [the Legal Services Corporation Act] there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed *necessary for its legitimate objectives*.") (emphasis added), *and id.* at 547, 121 S. Ct. 1043 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.").

[3] *Compare League of Women Voters*, 468 U.S. at 400, 104 S. Ct. 3106 (striking down restriction on editorializing, but noting that restriction "would plainly be valid" if "Congress were to adopt a revised version of [the statute] that permitted [public radio] stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with non federal funds"), *with American Library Ass'n*, 539 U.S. at 212, 123 S. Ct. 2297 (holding that requiring libraries to install filtering software on *every* computer with Internet access if the library receives *any* discount or funds from specified federal programs "does not 'penalize' libraries that choose not to install such software" because libraries that "wish to offer unfiltered access . . . are free to do so without federal assistance"), *and Rust*, 500 U.S. at 199 n.5, 111 S. Ct. 1759 (rejecting argument that prohibition on abortion counseling penalized speech funded with non-federal money by requiring that recipients of grants help finance federally-funded projects by using matching non-federal funds).

[4] *See, e.g., Velazquez II*, 531 U.S. at 546-47, 121 S. Ct. 1043 (striking down restriction on scope of legal aid attorneys' advocacy as condition of funding because "with respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict," even though the regulations at issue permitted funding recipients to establish affiliate organizations to conduct

willing and able to tackle these questions, our resolution simply could not substitute for the Supreme Court's attention. In any event, implying that this case is easy and involves a straightforward application of clear Supreme Court precedent does a disservice to the long list of judges from this and other courts who have wrestled to reconcile and correctly apply a complicated body of law.

The fact-specific nature of the inquiry makes this case particularly ill-suited to en banc consideration at this juncture, because our review here is from the grant of a preliminary injunction. Especially where, as here, the constitutional questions are both difficult and novel, they are better-resolved, in more concrete terms, after a resolution on the merits. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664-65, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004) (instructing that "[i]f the underlying constitutional question is close, . . . we should uphold the injunction and remand for trial on the merits."). The dissent suggests that because the panel opinion fails explicitly to "remand for a trial on the merits," the district court will simply allow the preliminary injunction to stand without further action. En banc dissent at 5490. This is simply untrue. A preliminary injunction is just that—preliminary. *See, e.g., University of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). The significant delays in prosecuting this case reflect nothing more than its complicated procedural history, including the defendants' decision mid-appeal to revise the guidelines at issue. *See Alliance for Open Soc'y Int'l*,

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litigation and other activities outside the scope of the LSC program).

Inc. v. U.S. Agency for Int'l Dev., 254 Fed. Appx. 843, 845-46 (2d Cir. 2007). Once the mandate issues, it is incumbent upon the district court to revive the litigation *See Alliance*, 651 F.3d at 239 (noting that "[b]ecause the Policy Requirement compels grantees to espouse the government's position on a controversial issue, the district court did not abuse its discretion in preliminarily enjoining its enforcement *pending a trial on the merits*") (emphasis added).

Plainly, I think the panel opinion correctly concluded that heightened scrutiny applies, and that for the reasons set forth in the panel opinion, that the Policy Requirement will likely be found to violate the First Amendment. For these reasons, I concur in the denial of rehearing en banc.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. 8209

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL., DEFENDANTS

May 8, 2006

DECISION AND ORDER

MARRERO, District Judge.

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I. INTRODUCTION

Plaintiffs, Alliance for Open Society International ("AOSI"), Open Society Institute ("OSI") and Pathfinder International ("Pathfinder") (collectively "Plaintiffs") brought suit against defendants, the United States Agency for International Development and Andrew S. Natsios in his official capacity as its administrator (collectively "USAID"), the United States Department of Health and Human Services and Michael O.

Leavitt in his official capacity as its Secretary (collectively "HHS"), and the United States Centers for Disease Control and Prevention and Julie Louise Gerbeding in her official capacity as its Director (collectively "CDC") (and USAID, HHS and CDC collectively "Defendants," or the "Agencies," or the "Government"). Plaintiffs seek clarification of a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Act"), 22 U.S.C. §§ 7601 *et seq.* Under the Act, AOSI receives funding from USAID and Pathfinder receives funding from USAID, HHS, and CDC to administer programs authorized by the Act. OSI does not receive government funding pursuant to the Act but fears that AOSI's funding under the Act may be jeopardized by OSI's activities.

The Act forbids the Agencies from awarding funds authorized for its purposes to "any group or organization that does not have a policy explicitly opposing prostitution[.]" 22 U.S.C. § 7631(f). Plaintiffs challenge Defendants' interpretation of this provision, which Plaintiffs contend places limits on Plaintiffs' activities carried out with their private, non-government funds, and leaves Plaintiffs with no alternative avenue to express certain points of view. Plaintiffs argue that this restriction violates the First Amendment. Thus, they seek a preliminary injunction enjoining Defendants from penalizing Plaintiffs, through the withholding of Act-authorized funds or other methods, on the grounds that Plaintiffs have used their private funding to engage in activities that Defendants view as insufficiently opposed to prostitution.

II. BACKGROUND[1]

A. *FACTS*

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[1] The factual recitation below derives from the following documents. Except as specifically quoted or otherwise cited, no further reference to these documents will be made.

For Plaintiffs: Complaint, *Alliance for Open Society International, Inc. et al. v. United States Agency for International Development et al.*, No. 05 CV 8209, filed September 23, 2005 (the "Complaint"); Memorandum of Law in Support of Plaintiffs Alliance for Open Society International and Open Society Institute for a Preliminary Injunction, dated September 28, 2005 ("Pl. Mem."); Memorandum of Law in Support of Motion of Plaintiff Pathfinder International for a Preliminary Injunction, dated December 7, 2005 ("Path. Mem."); Reply Memorandum of Law in Further Support of Motion of Plaintiffs Alliance for Open Society International and Open Society Institute, and Pathfinder International for a Preliminary Injunction ("Pl. Reply"); Declaration of Burt Neuborne, dated September 22, 2005 ("Neuborne Decl."); Declaration of Rosanna Barbero, dated September 19, 2005 ("Barbero Decl."); Declaration of Chris Beyrer, MD, MPH, dated September 21, 2005 ("Beyrer Decl."); Declaration of Pedro Chequer, MD, MPH, dated August 24, 2005 ("Chequer Decl."); Declaration of Rebekah Diller, dated September 22, 2005 ("Diller Decl."); Declaration of Robert Kushen, dated September 16, 2005 ("Kushen Decl."); Declaration of Ruth W. Messinger, dated August 16, 2005 ("Messinger Decl."); Declaration of Maurice I. Middleberg, dated July 27, 2005 ("Middleberg Decl."); Declaration of Aryeh Neier, dated September 13, 2005 ("Neier Decl."); Declaration of Daniel E. Pellegrom, dated December 7, 2005 ("Pellegrom Decl."); Supplemental Declaration of Rebekah Diller, dated January 24, 2006 ("Suppl. Diller Decl."); Supplemental Declaration of Robert Kushen, dated January 24, 2006 ("Suppl. Kushen Decl."); Supplemental Declaration of Daniel E. Pellegrom, dated January 24, 2006 ("Suppl. Pellegrom Decl.").

For Defendants: Defendants' Memorandum of Law in Opposition to Plaintiffs' Motions for a Preliminary Injunction and for a Temporary Restraining Order, dated January 4, 2006 ("Def. Mem."); Declaration of Richard E. Rosberger, dated January 4, 2006 ("Rosberger Decl.").

1. *The Parties*[2]

a. *Plaintiffs*

Plaintiffs are United States-based non-profit organizations actively participating in the worldwide effort to limit the spread of HIV/AIDS. As part of this effort, they work closely with populations that have a high risk of contracting HIV/AIDS, including persons engaged in prostitution.[3]

OSI is the principal United States-based foundation established and financed by George Soros, organized under New York law, supporting a network of more than

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[2] The Court has also benefitted from the advocacy of several *amici curiae:* Untitled Memorandum of Law of *Amici Curiae* AIDS Action and Twenty-One Other Organizations, dated November 7, 2005 ("AIDS Action Mem."); Memorandum of Law of Apne Aap and Eighteen Other Organizations as *Amici Curiae*, dated December 9, 2005 ("Apne Aap Mem."); and Memorandum of Law of Proposed *Amicus Curiae* InterAction in Support of Plaintiffs' Motion for a Preliminary Injunction, dated January 30, 2006 ("InterAction Mem.").

[3] The Court notes that the terminology to be applied to the issues discussed in this opinion is a point of contention between the parties. First, while Defendants use the term "prostitute" throughout their brief, Plaintiffs have used the term "sex worker" instead. The Court will use the term "prostitute" in this opinion, as the term "sex worker" does not appear in the statute at issue. In fact, in numerous provisions, including the section here at issue, the Act explicitly uses the term "prostitution" to describe the conduct the legislation addresses. Though Plaintiffs assert that the term "sex worker" is widely used in the public health and international relief fields, some of the amici dispute this contention and take offense at the notion of a "sex" worker. Second, Defendants refer to 22 U.S.C. § 7631(f)'s requirement that fund recipients have a policy opposing prostitution as the "organizational eligibility restriction," while Plaintiffs use the term "pledge requirement" to refer to this provision. The Court will refer to § 7631(f) as the "Policy Requirement" in this opinion.

thirty "Soros Foundations" that operate worldwide (the "Open Society Network"). Each of these Soros foundations is independently established under local laws and governed by a local board of directors. OSI does not currently receive funding from Defendants under the Act.

AOSI, although closely affiliated to OSI as a member of the Open Society Network, is a legally independent non-profit organization incorporated in Delaware with offices in New York, New York and Almaty, Kazakhstan. AOSI was created in 2003 with a mission to "promote democratic governance, human rights, public health and economic, legal and social reform" in Central Asia. (Kushen Decl. at 2.) AOSI administers a program, known as the Drug Demand Reduction Program ("DDRP"), aimed at limiting the spread of injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan. It has done so with the financial support of USAID, but also with a substantial private grant of nearly $2.2 million from OSI. The DDRP is directed towards three populations: drug users, high-risk groups (*e.g.*, young people, prisoners, prostitutes, and rural-urban migrants), and the general public.

Pathfinder provides family planning and reproductive health services in twenty countries. It administers a number of programs that benefit from the financial assistance of USAID, HHS, and the CDC, including a health services project in Peru, a program to prevent mother-to-child HIV transmission in Kenya, and other global reproductive health services programs. Pathfinder also uses funding from private sources to engage in the following activities: organizing of prostitutes in India to collectively agree to engage in HIV prevention

methods, like using condoms; as well as additional outreach to promote safer sex practices, including cooperation with brothel owners and pimps.

b. *Defendants*

i. *In General*

Created by executive order in 1961, USAID is an independent agency that provides economic, development, and humanitarian assistance around the world in support of the foreign policy goals of the United States. HHS is charged with protecting the health of all Americans and providing essential human services, to those ends managing programs encompassing health and social science research, food and drug safety, Medicare and Medicaid, faith-based and community initiatives, and financial assistance for low-income families. CDC, one of the operating components of HHS, works to prevent and control infectious and chronic diseases, injuries, workplace hazards, disabilities, and environmental health threats.

ii. *In Relation to the Act*

Pursuant to Congress's policy initiative, *see* 22 U.S.C. 7603(1), the President in his State of the Union Address on January 28, 2003, announced a comprehensive, five-year global strategy to fight HIV/AIDS.[4] USAID and HHS are two of the seven primary imple-

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[4] *See* President George W. Bush, State of the Union Address (January 28, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/01/2003012819.html.

menting agencies of the President's Emergency Plan for AIDS Relief ("Emergency Plan").[5]

Under the Emergency Plan, both USAID and HHS implement prevention, care, and treatment programs for HIV/AIDS. USAID supports implementation through direct in-country presence and seven regional programs. HHS operates in developing countries and conducts HIV/AIDS research. As an operating component of HHS, CDC coordinates its Global AIDS Program, which assists with surveillance, training, monitoring, evaluation, and implementation of HIV/AIDS prevention, treatment, and care programs, by partnering with governments, non-governmental organizations ("NGOs"), international organizations, U.S.-based universities and the private sector. *See* Emergency Plan at 149-50.

2. *HIV/AIDS*

a. *Internationally*

In passing the Act, Congress made a number of findings as to the global status of HIV/AIDS. The Court pauses to take note of some of these findings in order to establish the larger context in which the present dispute takes place. To begin, Congress found that "HIV/AIDS has assumed pandemic proportions, spreading . . . to all corners of the world, and leaving an unprecedented path of death and devastation." 22 U.S.C. § 7601(1). At the time of enactment, approximately 65 million people worldwide had been infected with the disease, of which

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[5] *See* Office of the United States Global AIDS Coordinator, *Action Today, A Foundation for Tomorrow: Second Annual Report to Congress on the President's Emergency Plan for AIDS Relief*, at 145-54 (2006), *available at* http://www.state.gov/documents/organization/60813.pdf.

more than 25 million had died. *See id.* § 7601(2). The effects of HIV/AIDS have permeated every conceivable level of social, cultural, political, economic and geographic organization, affecting individuals, families, communities, countries, economies and continents. *See id.* §§ 7601(3)-(12). Although these statistics have undoubtedly changed since the legislation's enactment, they establish the grievous situation that Congress sought to address through the provisions of the Act.

b. *In Central Asia*

Plaintiff AOSI contends that, as a result of spillover from the drug trafficking routes that run from Afghanistan through Tajikistan, Uzbekistan, and Kyrgyzstan, Central Asia has experienced dramatic increases in HIV/AIDS rates, with public health experts fearing "the outbreak of a full-scale HIV/AIDS epidemic fueled by the exploding use of injection drugs." (Kushen Decl. ¶ 8.) Already, Central Asia "is experiencing one of the world's fastest growing rates of HIV." (Beyrer Decl. ¶ 55.)

c. *Among High—Risk Populations*

HIV/AIDS often begins its assault on a community in small, high-risk populations, such as prostitutes and injection drug users. (*See* Beyrer Decl. ¶ 2.) In enacting the statute, Congress made clear its finding that prostitution and sex trafficking are "causes and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. § 7601(23). Indeed, in one congressional hearing Senator Sam Brownback set forth statistics from various countries demonstrating this connection, including that "50 to 70 percent of the Burmese prostitutes in Thailand are HIV positive . . . 40 to 50 percent of the prosti-

tutes in Cambodia are HIV positive, [and] 60 percent of women prostitutes in Bombay's red light district are infected with STDs or AIDS."[6] Considerable debate persists as to how to appropriately and effectively engage members of these groups. It has been argued that preventing the spread of infection among such high-risk individuals is an important way to combat the spread of HIV/AIDS in the general population. (*See, e.g.*, Beyrer Decl. ¶ 19) ("Stigma and discrimination push people in high risk groups . . . underground, making them difficult to reach through prevention programs and thus creating more opportunities for HIV/AIDS to spread to the general population."); *see also* USAID, *Leading the Way: USAID Responds to HIV/AIDS 1997-2000* (2001), attached to Diller Decl. as Exhibit 18 ("[I]nvolving individuals from the particular target community—sex workers, for example—in delivering the message gives credibility, reduces fear and stigma, and makes it more likely that people hearing the message will follow through with specific behaviors."). Advocates for these populations and programs believe that the imposition of harsh criminal penalties for prostitution runs contrary to accepted best principles and practices of public health. (*See, e.g.*, AIDS Action Mem. at 13-21.) One country, Brazil, as one part of its comprehensive HIV/AIDS program, has adopted an approach treating prostitutes as "essential partners" in the fight against HIV/AIDS. (Chequer Decl. ¶ 6.)

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[6] *Trafficking Women and Children in East Asia and Beyond: A Review of U.S. Policy, Hearing Before the Subcomm. on East Asian and Pacific Affairs of the Comm. On Foreign Relations*, 108th Cong. 18 (2003) (statement of Senator Sam Brownback).

3. *The Act*

a. *In General*

In response to this dire situation, Congress promulgated the Act with the single overriding purpose of "strengthen[ing] United States leadership and the effectiveness of the United States response to" HIV/AIDS, tuberculosis, and malaria. 22 U.S.C. § 7603. Congress designated several avenues through which this international campaign was to run: a comprehensive, five-year strategy designed by the President; bilateral and multilateral efforts; private sector efforts; public-private partnerships; and vaccine and treatment development. *See id.* § 7603(1)-(5).

To effectuate these ends, the Act, among other strategies, establishes an HIV/AIDS Response Coordinator, *see id.* § 7612; authorizes an HIV/AIDS Working Capital Fund, *see id.* § 7612a; authorizes U.S. participation in the Global Fund to Fight AIDS, Tuberculosis, and Malaria, *see id.* § 7622; authorizes the use of funds to assist organizations in fighting HIV/AIDS, *see id.* § 7631, tuberculosis, *see id.* § 7632, and malaria, *see id.* § 7633; provides assistance for children and families, *see id.* §§ 7651-7655; and provides for consideration of expanding debt relief, *see id.* § 7681.

b. *Role of Private Partners in Combating HIV/AIDS*

Recognizing that "[n]on-governmental organizations . . . have proven effective in combating the HIV/AIDS pandemic," *id.* § 7601(18), Congress voiced its sense that "the sustainment and promotion of public-private partnerships should be a priority element of the strategy

pursued by the United States to combat the HIV/AIDS pandemic and other global health crises," *id.* § 7621(b)(1).

c. *Findings and Policies Regarding the Social and Behavioral Causes of HIV/AIDS, Particularly Prostitution*

In the Act, Congress expressed its concern with the social, cultural, and behavioral antecedents of the HIV/AIDS pandemic, determining that "[s]uccessful strategies to stem the HIV/AIDS pandemic will require . . . measures to address the social and behavioral causes of the problem." § 7601(15); *see also* § 7601(21)(C).

Congress considered prostitution to be among the behavioral causes of HIV/AIDS. *See* § 7611(a)(4) ("[T]he reduction of HIV/AIDS behavioral risks shall be a priority of all prevention efforts in terms of funding, educational messages, and activities by . . . [among other things,] eradicating prostitution, the sex trade, rape, sexual assault and sexual exploitation of women and children.").

In addition, Congress expressly found that the eradication of prostitution should be a policy of the United States:

> Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic.

§ 7601(23).

d. *The Government Funds Restriction*

The provision of the Act referred to by Plaintiffs as the "the restriction on government funds" and by Defendants as the "government funding restriction" states:

> No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

§ 7631(e) ("§ 7631(e)").

Plaintiffs do not challenge the restriction placed on government funds.

e. *The Policy Requirement*

In addition to the government funds restriction, the Act provides:

> No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

§ 7631(f) ("§ 7631(f)" or the "Policy Requirement").

It is the interpretation and implementation of this provision that is the point of contention in this case.

The final clause of this provision exempts certain recipients from the Policy Requirement. *See* § 7631(f). Some of these exempted recipients have recognized that advocacy for the reduction or removal of criminal penalties for prostitution is among the best practices in HIV prevention. (*See* Beyrer Decl. ¶ 25.)

4. *Defendants' Implementation of the Act*

a. *USAID*

i. *Acquisition and Assistance Policy Directives*

USAID initially refrained from applying the Policy Requirement to U.S.-based organizations because the Department of Justice ("DOJ") warned that such an application would be unconstitutional.[7] Specifically, USAID issued guidance stating that the government funds restriction applied to both U.S. and foreign recipients, but that the Policy Requirement required only "non-U.S. non-governmental organizations and certain Public International Organizations . . . to agree that they have a policy explicitly opposing . . . prostitution and sex trafficking." *Id.* USAID followed the DOJ's advice, issuing a policy directive omitting any requirement that U.S.-based organizations receiving funds un-

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[7] *See* USAID, *Guidance on the Definition and Use of the Child Survival and Health Programs Fund and the Global HIV/AIDS Initiative Account, FY 2004 Update*, dated July 22, 2004, attached to Diller Decl. as Exhibit 4.

der the Act have a policy explicitly opposing prostitution.[8]

Subsequently, the DOJ withdrew what it characterized as its prior "tentative advice."[9] The DOJ asserted that there are "reasonable arguments to support" the constitutionality of applying the restrictions to U.S.-based recipients. *Id.*

Following suit with the revised DOJ position, USAID changed course in June 2005, issuing a directive applying the Policy Requirement to U.S.-based recipients.[10] Under AAPD 05-04, USAID required, as a prerequisite for private organizations to receive funding under the Act, (1) a policy explicitly opposing prostitution and sex trafficking (*see id.* at 5), and (2) certification of compli-

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[8] *See* USAID, *Acquisition & Assistance Policy Directive 04-04 (Revised)—Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking* ("AAPD 04-04"), issued February 26, 2004, attached to Diller Decl. as Exhibit 2. "AAPDs . . . provide information of significance to contracting personnel including (but not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, they have been used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations." Acquisition & Assistance Policy Directives (AAPDs)/Contract Information Bulletins (CIBs) Index, USAID, at http://www.usaid.gov/business/business-opportunities/cib/ (last modified March 24, 2006).

[9] Letter from Daniel Levin, U.S. Department of Justice, to Alex Azar, II, U.S. Department of Health and Human Services, dated September 20, 2004, attached to Diller Decl. as Exhibit 7.

[10] *See* USAID, *Acquisition & Assistance Policy Directive 05-04, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003—Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking* ("AAPD 05-04"), issued June 9, 2005, attached to Rosberger Decl. as Exhibit C and to Diller Decl. as Exhibit 3.

ance with the "Prohibition on the Promotion and Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking" (*id.* at 7). This shift in position coincided with pressure exerted upon USAID and the President by members of Congress concerning the allocation of funds under the Act.[11]

ii. *Plaintiffs Seek Clarification of Requirements*

Under USAID's initial interpretation of the Act, as reflected in AAPD 04-04, AOSI was not itself subject to the Policy Requirement. *See supra* Section I.A.4.a.i. However, because AOSI partnered with non-U.S.-based organizations in administering the DDRP, it adopted the following policy:

> AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan believe that trafficking and sex work do harm both to the individuals directly involved and to others in various ways. AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan do not promote or advocate such activities. Rather, our approach is to try to reduce the harms caused by disseminating

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[11] *See* Letter from U.S. Representative Mark E. Souder, Chairman of the House Committee on Government Reform's Subcommittee on Criminal Justice, Drug Policy, and Human Resources, to James Kunder, Assistant Administrator, Asia and Near East Bureau, USAID, dated October 6, 2005, attached to Suppl. Diller Decl. as Exhibit 1; Letter from U.S. Representative Mark E. Souder to Andrew Natsios, Administrator, USAID, dated December 7, 2005, attached to Suppl. Diller Decl. as Exhibit 2; Letter from Tom A. Coburn, M.D., Chairman of the Subcommittee on Federal Financial Management, Government Information, and International Security, to President George W. Bush, dated May 19, 2005, attached to Diller Decl. as Exhibit 9; Letter from U.S. Representative Mark Souder et. al., to Andrew Natsios, Administrator of USAID, dated July 15, 2005, attached to Diller Decl. as Exhibit 10.

> credible information on questions such as the prevention of disease, and by providing direct public health assistance to vulnerable populations . . .

(Kushen Decl. ¶ 23).

In a memorandum dated May 26, 2004, AOSI asked Kerry Pelzman, Regional HIV/AIDS Adviser for USAID/Central Asia, for guidance concerning its compliance with AAPD 04-04.[12] The memo stated that AOSI believed itself to be exempt from the Policy Requirement as a U.S-based organization, but sought clarification regarding funds given to non-U.S.-based subgrantees. (*Id.*) It further explained that internal principles of governance prevented AOSI from accepting funding that would restrict its speech "in a manner contrary to the values of an open society." (*Id.*) The memo recited AOSI's policy statement and requested, in writing, confirmation that it complied with AAPD 04-04.

On June 13, 2004, AOSI received a response from Pelzman via e-mail. (*See* Kushen Decl., Exhibit B, at 2-3.) The June 13 e-mail neither certified AOSI's compliance nor provided any substantive advice. (*See id.*) Accordingly, AOSI again solicited guidance from USAID. By a second e-mail to Pelzman on June 15, 2004, AOSI clarified that it was seeking advice specifically relating to the question of whether AOSI's policy satisfied the requirements of AAPD 04-04. (*See* Kushen Decl., Exhibit B, at 2 ("Our goal in sending you our policy was for AID to provide an interpretation of the AAPD and re-

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[12] *See* Memo from Robert Kushen, Chairperson of AOSI, et. al, to Kerry Pelzman, Regional HIV/AIDS Adviser for USAID/Central Asia, dated May 26, 2004, attached to Kushen Decl. as Exhibit A.

lated provisions and determine if our policy complied with the law and AID's policies.").)

In response, Belinda K. Barrington, in her capacity as Acting Regional Legal Advisor, USAID/Central Asia sent AOSI an e-mail on June 18, 2004. (*See* Kushen Decl., Exhibit B, at 1.) Barrington apparently interpreted the past correspondence between AOSI and the agency as raising a question of AOSI's ability to certify its compliance consistently with its internal governance principles. (*See id.* ("The issue was not, as your June 15th e-mail seems to suggest, whether your policy complies with the law or USAID policies, but whether AOSI is able to sign or is comfortable with signing the certification required.").) As to whether its policy was in compliance, AOSI was told that "[o]nly future actions can determine whether recipients have complied with the certification." (*Id.*)

Still uncertain as to whether AOSI's policy was in compliance, Robert Kushen, Chairperson of AOSI, arranged a meeting with USAID officials. Present at a meeting held on April 11, 2005 were Kent Hill, Acting Assistant Administrator for Global Health at USAID; Susan Pascocello, Acting Assistant General Counsel to Global Health; and various other USAID officials and AOSI staff. Plaintiffs allege that, in the course of this meeting, Hill cautioned that he could not proffer official guidance, but divulged his belief that (1) organizations that promoted the legalization of prostitution would violate the requirement and (2) organizations that limited their activities to providing health services to prostitutes would be in compliance. Plaintiffs allege that questions about the status of the universe of activities between these two poles were unanswered.

On June 9, 2005, USAID issued AAPD 05-04, shifting its prior stance and applying the Policy Requirement to both U.S.-based and non-U.S.-based organizations receiving funding under the Act. *See supra* Section II.A.4.a.i. AOSI then contacted USAID on June 13, 2005 again to reaffirm its belief that its policy complied with the requirement, emphasizing the distinction between OSI and AOSI, and highlighting the problems with an overly broad interpretation of the Act.[13]

While waiting for USAID's response, a question arose over the allocation of interim funds for the DDRP. On August 2, 2005, AOSI received a response via facsimile. (*See* Neier Decl., attached as Exhibit D.) USAID reiterated its position that "prospective determinations for private organizations about whether or not their policy statements comply with the statutory requirement reflected in AAPD 05-04" were inappropriate. (*See id.* at 1.) It outlined the contours of what a future inquiry of compliance might look like, including verification that (1) the certification had been signed, (2) certification clauses were incorporated into sub-awards, and (3) policies explicitly opposing prostitution were in place.

On August 3, 2005, AOSI received a Modification of Assistance from USAID to restart funding. (*See* Kushen Decl., attached as Exhibit C.) The Acting Executive Director of AOSI, Oksana Korneo, decided to sign the modification agreement to ensure the survival of the DDRP. (*See id.*) Once funding had been allocated, according to the complaint in this action, AOSI felt com-

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[13] *See* Letter from Aryeh Neier, President of OSI and Member of AOSI Board of Directors, to Andrew Natsios, Administrator of USAID, dated June 13, 2005, attached to Neier Decl. as Exhibit C.

fortable proceeding with the present litigation. (Compl. ¶ 67.)

Subsequent to filing suit for a preliminary injunction, AOSI received a letter from USAID in October 2005 indicating that "advocating for the legalization of prostitution" or "organizing or unionizing prostitutes for the purpose of advocating for the legalization of prostitution" will result in a finding of noncompliance.[14]

b. *HHS and the CDC*

The factual record concerning the implementation of the Act by the HHS and the CDC is considerably less complete. Plaintiff Pathfinder alleges that "in all relevant respects Defendant CDC is implementing the pledge requirement in the same manner as Defendant USAID." (Path. Mem. at 3.) Following the DOJ's change of course, *see supra* Section II.A.4.a.i, the CDC allegedly began applying the Policy Requirement to U.S.-based recipients "on or about" May 2005. (*Id.*) This shift is reflected in the cooperative agreements between Pathfinder and HHS and the CDC. Whereas earlier agreements lack the new standard provisions, which include the Policy Requirement (*see* Suppl. Pellegrom Decl., attached as Exhibits 3-5); later agreements do in fact subject Pathfinder to the Policy Requirement (*see* Pellegrom Decl., attached as Exhibits 6-9).[15]

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[14] Letter from Christopher D. Crowley, USAID Mission Director, to Galina Karmanova, AOSI, dated October 7, 2005, attached to Rosberger Decl. as Exhibit D.

[15] *See also* Expanding and Support of HIV/AIDS/STI/TB Information, Education, and Communication and Behavior Change Communication Activities in Ethiopia—Amendment, Centers for Disease Control and Prevention, 70 Fed. Reg. 29759 (May 24, 2005), attached to Rosber-

In July 2005, Pathfinder adopted the following policy to comply with the requirement:

> In order to be eligible for federal funding for HIV/AIDS, Pathfinder opposes prostitution and sex trafficking because of the harm they cause primarily to women. Pathfinder's HIV/AIDS programs seek to promote effective ways to prevent the transmission of HIV/AIDS and to reduce the suffering caused by HIV/AIDS. In order to achieve these goals, Pathfinder works with, and provides assistance and support to and for, many vulnerable groups, including women who are commercial sex workers, who, if not effectively reached by HIV/AIDS programs, will suffer and can become drivers of the HIV/AIDS epidemic.

(Pellegrom Decl. ¶ 17.)

5. *Plaintiffs' Complaint and Motions for a Preliminary Injunction*

On September 23, 2005, OSI and AOSI filed the complaint commencing this action against USAID, and moved for a preliminary injunction on September 28, 2005. The Court held a conference on October 7, 2005 at which the parties resolved to undertake to agree upon a briefing schedule and enter into a temporary "standstill" agreement, with the Government to agree that AOSI and OSI[16] could continue their activities pending the outcome of the preliminary injunction motion. Because

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ger Decl. as Exhibit E (providing that "any recipient must have a policy explicitly opposing prostitution and sex trafficking").

[16] Pathfinder had not yet been added to the case as a plaintiff, and HHS and CDC had not yet been added as defendants.

the parties were initially unable to come to an agreement, AOSI and OSI moved for a Temporary Restraining Order on October 12, 2005. Following a phone conference, the parties continued to negotiate, and entered into a stipulated agreement on October 14, 2005. The agreement provided that pending the decision on the motions for a preliminary injunction and temporary retraining order, AOSI would continue to comply with its understanding of the Policy Requirement in good faith, and USAID agreed to provide at least two weeks notice prior to taking any action to redress any perceived violation of the Act. On December 5, an amended complaint was filed adding Pathfinder as a plaintiff and HHS, Leavitt, the CDC, and Gerberding as defendants. Pathfinder thereafter filed a motion for a preliminary injunction. Its supporting brief set forth the relevant facts with regard to Pathfinder and incorporated all of the legal arguments from AOSI's and OSI's memorandum of law in support of a preliminary injunction.[17]

Plaintiffs seek a declaratory judgment that the Policy Requirement requires only that U.S-based recipients state that prostitution causes harm to women, but does not in any way restrict the activities that recipients may engage in with their private funds. In the alternative, they seek a declaratory judgment that Defendants' application of the Policy Requirement is unconstitutional.

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[17] On January 12, 2006, the Court So Ordered a stipulation entered between USAID and Pathfinder, memorializing their standstill agreement following Pathfinder's entry into the case. On the same date, the Court also So Ordered a stipulation between Pathfinder and HHS and CDC, memorializing their standstill agreement.

Plaintiffs also seek a preliminary injunction barring Defendants from (1) discontinuing funding until a ruling on the merits of this litigation, (2) unilaterally terminating the cooperative agreements, and (3) otherwise taking action solely on the ground that Plaintiffs engaged in privately-funded speech. To this end, they allege that there is a likelihood they will succeed on the merits and that they will suffer irreparable harm if the injunction is denied.

OSI claims that it will be irreparably harmed due to the uncertainty as to whether the Policy Requirement will be applied to its activities by its association with AOSI, even though it is not technically a partner in the DDRP or a recipient of federal funds pursuant to the Act. OSI emphasizes that it has already been subjected to scrutiny by some members of Congress. Accordingly, OSI claims that, absent assurances that its speech will not be imputed to AOSI, it must monitor its own speech for fear of endangering AOSI.

Section 6(e) of the cooperative agreement between AOSI and USAID provides that "any violation . . . shall be grounds for unilateral termination of the agreement by USAID prior to the end of its term." (Suppl. Kushen Decl., attached as Exhibit 1.) AOSI claims that USAID's implementation of the Policy Requirement (1) compels the organization to engage in speech against its own will, (2) forces it to monitor its own speech and refrain from engaging in certain activities, even with its private funds, for fear of unilateral termination of government funding, and (3) violates AOSI's internal rules of governance. As an example, AOSI claims it will be chilled from fully participating in a conference in June 2006 entitled "Sexual Rights, Sexual Health: Counter-

ing the Conservative Sexual Agenda," which will include a discussion of the legal status of prostitution. (Suppl. Kushen Decl. ¶ 3.)

Pathfinder alleges that it must refrain from using its private funding in such a manner as to run afoul of a broad interpretation of the Policy Requirement. For example, Pathfinder wishes to continue using its private funds to "organize sex workers in India," to collaborate "with community organizations in Brazil that . . . have sought to change the legal regime surrounding sex work," and, more generally, to engage in a thoughtful policy debate on the appropriate legal regime for prostitution. (Path. Mem. at 5-6.) Pathfinder fears that Defendants may penalize it for such activities. *See* 45 C.F.R. §§ 74.13, 74.6, 74.62 (2006) (permitting the HHS to unilaterally terminate the award and disqualify the grantee from receiving future funding as a penalty for violating the Policy Requirement); Expanding and Support of HIV/AIDS/STI/TB Information, Education, and Communication and Behavior Change Communication Activities in Ethiopia—Amendment, Centers for Disease Control and Prevention, 70 Fed. Reg. 29760 (May 24, 2005), attached to Rosberger Decl. as Exhibit E ("Any violation of the provisions shall be grounds for unilateral termination of the agreement prior to the end of its term.").

III. APPLICABLE STANDARD FOR PRELIMINARY INJUNCTION

The Court notes at the outset that it will address only Plaintiffs' as applied challenges to Defendants' construction of the Policy Requirement. Plaintiffs state that they are bringing an as applied challenge to Defen-

dants' statutory construction of the statute, as well as challenging the constitutionality of the agency's interpretation both facially and as applied. The Court is not persuaded of the necessity to address a facial challenge to Defendants' interpretation of the statute at this early stage in the litigation and before the Agencies have undergone a review process or issued any formal guidance or regulations on the implementation of the Act and the meaning of the phrase "policy opposing prostitution." At this juncture, the Court views it as premature to look beyond the facts presented by these parties, particularly, as noted, prior to any formal statutory construction or regulatory action on the part of the Agencies. Thus the Court confines its analysis to the question of whether a preliminary injunction preventing Defendants from penalizing Plaintiffs for engaging in protected speech with their private funds should be issued pending the final outcome of this litigation.

For the Court to issue a preliminary injunction against the government, Plaintiffs must demonstrate both a likelihood of success on the merits and a threat of irreparable harm. *See, e.g., Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 763 (2d Cir. 1999) (*"Velazquez I"*). The Court will first address the requirement that Plaintiffs demonstrate a likelihood of success on the merits. In considering this question, the Court must first analyze the parties' statutory construction arguments, to determine whether or not Plaintiffs can prevail on their claims that Defendants' reading of § 7631(f), to the limited extent an interpretation or application has been articulated, is incorrect, and should be supplanted by Plaintiffs' construction pursuant to the canon of constitutional avoidance. Because the Court concludes that

Plaintiffs have not demonstrated that Defendants' statutory construction regarding certain issues central to this action is erroneous, it then turns to the question of whether Plaintiffs are likely to show that the Policy Requirement, as construed by Defendants, violates the First Amendment by restricting Plaintiffs' privately funded speech, leaving Plaintiffs with no alternative means of communicating countering viewpoints, and compelling Plaintiffs to adopt an organization-wide policy consistent with the Government's position.

IV. DISCUSSION

A. *Likelihood of Success on the Merits*

1. *Statutory Interpretation*

According to Plaintiffs, § 7631(f)'s Policy Requirement demands only a declaration that the applicant for funding under the Act generally opposes the harms caused by prostitution and that if it has complied with this condition, the organization should not lose its contract for engaging in specific activities, such as advocating for changes in the legal status of prostitution, or providing funding or technical assistance to entities that so advocate, as long as no Act funds are used for these purposes. Plaintiffs make several arguments in support of this proposition. First, they assert that the plain text compels that interpretation of the statute. Second, they argue that their construction is also supported by the purpose of the Act, as well as by legislative history. Third, they maintain that Defendants' interpretation saps other statutory provisions of meaning, including rendering § 7631(e)—the government funds restriction—superfluous. Finally, they argue that Defendants' interpretation necessarily implicates constitutional is-

sues and thus acceptance of that reading would violate the doctrine of constitutional avoidance, under which courts are to narrowly construe statutes so as to avoid conflicts with constitutional provisions. The Court will address each of these arguments in turn.

a. *Plain Meaning of the Statutory Text*

As discussed above, § 7631(f) requires organizations receiving funds under the Act to have a "policy explicitly opposing prostitution."[18] According to Plaintiffs, the word "policy," by its plain meaning, indicates that the statute requires nothing more than a general statement—a declaration of "general orientation only," regardless of the specific program activities the organization actually undertakes. (Pl. Br. at 16.) In support of this argument they proffer definitions from *Black's Law Dictionary*, the *American Heritage Dictionary of the English Language*, and Congress's use of the word "policy" elsewhere in the Act.

This argument fails, even under the definitions set forth in the dictionaries that Plaintiffs cite. As Plaintiffs themselves point out, *Black's Law Dictionary* defines "policies" as "general principles by which a government is guided." (Pl. Br. at 16) (*citing Black's Law Dictionary* 1157 (6th ed. 1990).)[19] Although Plaintiffs emphasize the words "general principles" in this definition, the

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[18] The statute also requires such organizations to have a "policy explicitly opposing . . . sex trafficking," *see* § 7631(f), but Plaintiffs are not contesting that portion of the statute.

[19] The Eighth Edition of *Black's Law Dictionary* contains the same definition: "the general principles by which a government is guided in its management of public affairs." *Black's Law Dictionary* 1196 (8th ed. 2004).

second half of the definition—"by which a government is guided"—indicates that the words "general principles" are used in context: that a policy could encompass a statement of principle, but that such statement indicates and is intended to guide an organization's *actions*. Otherwise, any policy an entity adopts—whether voluntarily or compelled, whether informally or pursuant to stated procedure—and then in practice ignores, would amount to nothing more than lofty ornamentation, an empty ceremony of words. Similarly, the definition in the *American Heritage* dictionary—a "plan *or course of action*" or "*guiding* principle"—by its terms suggests more than the lip service of a written statement. *American Heritage Dictionary of the English Language* 1401 (3d ed. 1996) (emphasis added). Conduct inconsistent with the principle would mean that the policy no longer served as a *guiding* principle.[20] The more reasonable conclusion to draw from these definitions is that a policy is not just a set of abstract disembodied words that have no bearing on or connection to an organization's conduct. Rather, the term constitutes an expression of principle that sets forth, mirrors and guides an organization's conduct along the paths of its mission and purposes. If anything, the plain text of the statute demonstrates that conforming conduct is not only necessarily interwoven

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[20] Moreover, even assuming that a policy were just a statement of principle, those same dictionary sources reveal that a "principle" is not necessarily merely a statement, but can encompass conduct, action or activity in conformity with what is stated. A "principle" is "a basic rule, law or doctrine." *Black's Law Dictionary* 1231. A "rule" is "an established and authoritative standard or principle; a general norm *mandating or guiding conduct or action* in a given type of situation," *id.* 1357 (emphasis added); a "doctrine" is "a principle, esp[ecially] a legal principle, *that is widely adhered to.*" *Id.* 518 (emphasis added).

with words but expected when issued as an organization's "policy."

Plaintiffs' argument that Congress's use of the word "policy" elsewhere in the Act reinforces their reading of the statute is unpersuasive. According to Plaintiffs, throughout the Act the term "policy" refers consistently to generalized goals, not to means used to achieve those goals, while other words, such as "project" or "program" refer to activities. Yet § 7652, to which Plaintiffs point, is not properly read this way. That section of the statute, entitled "Policy and Requirements," states, under the subsection entitled "Policy":

> The United States Government's response to the global HIV/AIDS pandemic should place high priority on the prevention of mother-to-child transmission, the care and treatment of family members and caregivers, and the care of children orphaned by AIDS. To the maximum extent possible, the United States Government should seek to leverage its funds by seeking matching contributions from the private sector, other national governments, and international organizations.

22 U.S.C. § 7652(a). The "policy" itself contains suggested conduct to which some follow-up commitment is made—such as "seek[ing] to leverage" funds and "seeking matching contributions." Section 7652(b), entitled and containing the "Requirements," simply enumerates certain mandated activities (such as "expand[ing] programs designed to care for children orphaned by AIDS") and benchmarks ("provid[ing] for meeting or exceeding the goal to reduce the rate of mother-to-child transmission of HIV by 20 percent by 2005 and by 50 percent by

2010") in conformity with the policy, but does not mean that the policy does not encompass those or other activities.

At oral argument, Plaintiffs argued that it was not their contention that they should be permitted to adopt a policy and then flout it by engaging in conduct contrary to that policy. Rather, Plaintiffs asserted that different courses of conduct (*i.e.*, different approaches to the problem) could be consistent with having a "policy opposing prostitution," and as such they vigorously contest Defendants' position that only a narrow set of actions is consistent with having a policy opposing prostitution. Thus, Plaintiffs argue, they are not seeking an interpretation of the term "policy" that is disembodied from conduct or action; instead they seek recognition that a wide array of conduct, including possibly advocating for a reduction in criminal penalties for prostitution, is consistent with having a "policy opposing prostitution."[21] The Court is not persuaded by this argument. Problematically, it leaves no room for agency interpretation of the term "policy opposing prostitution," as it would allow Plaintiffs to unilaterally designate which among various courses of conduct they view as fulfilling the provision's meaning. While Plaintiffs are correct

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[21] The term "conduct" is used throughout this section in discussing the notion that with a policy must come some course of action (or "conduct") that is related to that policy, *i.e.*, that a policy cannot stand on its own divorced from any particular course of action. Thus, conduct is not being used here to refer to, or distinguish, non-expressive activity, or activities in which speech is incidental to the conduct. On the contrary, it is clear that the activities, or conduct, at issue here (*e.g.*, advocacy for or discussion of change of the legal treatment of prostitution, outreach and education regarding sexual health and activity, organization of prostitutes) are speech-related, expressive activities.

that different courses of action can be consistent with a stated policy, and that in § 7631(f) Congress did not specify which courses of action it would view as manifesting a policy opposing prostitution, this does not mean that Congress meant that *any* conduct Plaintiffs pronounce to be consistent with such a policy is necessarily so. Again, if this were the case, the provision would be barren of meaning.

b. *Purpose of the Statute*

Plaintiffs argue that their interpretation of § 7631(f) supports the purpose of the statute. According to Plaintiffs, the overarching purpose of the Act is "to fight the spread of HIV/AIDS and other diseases." (Pl. Reply Br. at 27.) Moreover, under that view, because organizations, after issuing a statement opposing the harms caused by prostitution, remain free to choose the strategies that they deem most effective in responding to the HIV/AIDS epidemic, such a reading furthers the purpose of the Act. Plaintiffs' theory further suggests that "eradicating prostitution" is a "secondary" objective whereas the primary goal of the Act is to address HIV/AIDS. Since Plaintiffs' work seeks to combat the spread of HIV/AIDS, impeding that mission is inconsistent with the primary purpose of the Act. (*See also* AIDS Action Mem. at 5 ("[T]he pledge requirement undermines, rather than supports, the public health objectives of the AIDS Leadership Act. . . . ")).

In contrast, Defendants argue that Plaintiffs' interpretation would in fact "frustrate the Act's strategies and goals, and create an environment for risky behavior that the Act aims to prevent as part of its comprehensive

approach to fighting the spread of HIV/AIDS." (Def. Mem. at 22.)

It is clear that combating the spread of HIV/AIDS and other diseases—and making the United States a leader in this effort—is the primary goal of the Act. Indeed, as noted above, the Act expressly declares so in stating that its purpose is "to strengthen United States leadership and the effectiveness of the United States response to certain global infectious diseases [HIV/AIDS, tuberculosis and malaria]," and designating several means through which to achieve this end. 22 U.S.C. § 7603. The focus of this statement of purpose is clearly on eradicating disease; the language does not mention eradicating prostitution. Rather, the statement that it should be the policy of the United States to "eradicate" prostitution is embedded in the "Findings" section of the statute. *See id.* § 7601(23). However, Congress made several policy and strategic choices as to how it would meet its primary goal of eradicating HIV/AIDS. One of those choices, based on the finding that prostitution is a cause of HIV/AIDS, was to eradicate prostitution. Indeed, Congress specifically found that the sex industry was one of the causes of and factors in the spread of HIV/AIDS. *See id.* § 7601(23).

At minimum in light of this finding, the statute indicates that eradicating prostitution is an integral *part of* the comprehensive strategy Congress envisioned in the fight against HIV/AIDS. In the section setting forth the "Comprehensive Strategy"—which itself is described as part of the purpose of the statute, *see id.* § 7603(1)—Congress stated:

> The President shall establish a comprehensive, integrated, five-year *strategy to combat HIV/AIDS . . . Such strategy . . . shall . . . provide that the reduction of HIV/AIDS behavioral risks shall be a priority* of all prevention efforts in terms of funding, educational messages, and activities *by . . . eradicating prostitution . . .*

Id. § 7611(a)(4) (emphasis added).

Congress thus explicitly chose to include eradicating prostitution in its strategy to fight HIV/AIDS under the statute. Whether or not other approaches—such as legalizing prostitution, or reforming the sex industry through unionizing prostitutes, or other approaches advocated by Plaintiffs and other organizations—are more effective programmatic responses to HIV/AIDS, that choice among strategies was already made by Congress and unequivocally adopted in the Act. In legislating ways and means, Congress is free to choose which strategies best serve the goal to fight HIV/AIDS. In this case, Congress manifestly chose to prescribe a strategy with which at least some of Plaintiffs' program strategies are at odds.

Although, as Plaintiffs point out, Congress's finding that prostitution is "degrading to women and children and it should be the policy of the United States to eradicate such practices" is embedded among twenty-seven other congressional findings regarding a large-scale effort to prevent, treat, and eradicate HIV/AIDS, those other findings do not suggest that eradicating prostitution was not meant to be part of this large-scale effort, or that Congress was thereby making a deliberate normative choice to regard the eradication of prostitution as

a "secondary" purpose. Apropos of this issue, the Court notes the observation proffered by the AIDS Action *amici* that reducing the stigma associated with HIV/AIDS is part of how Congress described an appropriate response to the HIV/AIDS pandemic, and that forcing organizations to adopt a stance opposing prostitution could lead to more stigmatization of the very individuals these organizations are trying to help. *See* 22 U.S.C. § 7601(21)(C) ("The magnitude and scope of the HIV/AIDS crisis demands a comprehensive, long-term, international response focused upon addressing the causes, reducing the spread, and ameliorating the consequences of the HIV/AIDS pandemic, *including . . . development and implementation of national and community-based multisector strategies that . . . increase the participation of at-risk populations in programs designed to . . . reduce the stigma associated with HIV/AIDS*") (emphasis added). Other *amici*, however, who also provide HIV/AIDS prevention services to prostitutes, argue that requiring organizations to oppose prostitution, including requiring them to oppose the legalization of prostitution, does not stigmatize prostitutes and in fact that such opposition is necessary to work effectively against the harms inflicted by prostitution, including HIV/AIDS. (*See* Apne Aap Mem. at 12-13.) Regardless of who has the better of these policy arguments, it is clear that the question as to whether opposition to prostitution does or does not necessarily involve stigmatization is at least arguable, and that Congress, by including findings addressing the problems of both HIV/AIDS and prostitution in the same statute did not view the opposition of prostitution as necessarily stigmatizing of this population.

c. *Legislative History*

Plaintiffs' key, indeed entire, piece of evidence in the legislative history arsenal is an exchange on the Senate floor between Senate Majority Leader Bill Frist and Senator Patrick Leahy. In it Senator Leahy expressed concern about the potential counterproductive consequence of the Policy Requirement insofar as it could impair the relationship of trust necessary between the organizations that help women involved in the sex industry and the victims they seek to serve, and thereby impede the effectiveness of these programs. In response, Senator Frist assured Senator Leahy that he was in agreement that the organizations who work with and on behalf of these women need to be supported in their efforts, while at the same time noting that the legislation should be careful to not condone prostitution or sex trafficking. *See* 149 Cong. Rec. S6451-01, S6457 (daily ed. May 15, 2003). Senator Frist then stated that the answer to this issue would be "to include a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women." *Id.* He further noted that "[s]uch a statement . . . would satisfy the intent of this provision." *Id.*[22]

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[22] The full text of the colloquy is set forth below:

Mr. LEAHY: Mr. President, I see the distinguished majority leader, Senator Frist, and wonder if I could ask him to address a concern I and other Senators have about a provision entitled "Limitation" which is located on page 62, line 13 of the bill.

Mr. FRIST: I would be happy to.

Mr. LEAHY: This provision says that no funds made available to carry out this act may be used to provide assistance to any group or organization that does not have a policy "explicitly opposing" prostitution and sex trafficking. On its face, this provision appears harmless. No one here supports prostitution or sex trafficking. In fact, we abhor these practices, which are demeaning and degrading towards women, and also extremely dangerous. The rate of HIV infection among prostitutes in Cambodia is estimated to be 40 percent. India is facing a similar catastrophe. It is no secret that commercial sex workers and sex trafficking are a major cause of HIV transmission in Asia and in parts of Africa. We all want to see these practices end.

But the reality is that they exist. Prostitution and sex trafficking are rampant, not only in parts of Africa and Asia, but in Eastern Europe and the former Soviet republics, the Caribbean, and parts of Latin America. Any effective strategy to combat HIV/AIDS must include programs to reduce its spread through prostitution and sex trafficking. As difficult as it is, this reality cannot be ignored.

There are organizations who work directly with commercial sex workers and women who have been the victims of trafficking, to educate them about HIV/AIDS, to counsel them to get tested, to help them escape if they are being held against their will, and to provide them with condoms to protect themselves from infection. This work is not easy. It can also be dangerous. It requires a relationship of trust between the organizations and the women who need protection.

I am concerned that this provision, which requires such organizations to explicitly oppose prostitution and sex trafficking, could impede their effectiveness. In fact, some or many of these organizations may refuse to condemn the behavior of the women whose trust they need in order to convince them to protect themselves against HIV. I would ask the Majority Leader how we can avoid that result, because we need to be able to support these organizations.

Mr. FRIST: I thank the Senator from Vermont for his question. I agree that these organizations who work with prostitutes and

According to Plaintiffs, this exchange demonstrates that Congress intended § 7631(f) to be satisfied by a simple statement from an organization that it opposes prostitution, without otherwise imposing any impediments upon that organization's activities. Under this interpretation, § 7631(f) "was simply a means for Congress to express its opposition to prostitution generally, while funding organizations that work closely with sex workers to prevent the spread of HIV/AIDS." (Pl. Reply at 30.)

There are aspects of Plaintiffs' interpretation of this exchange that appear compelling. Indeed, Senator Frist's words do seem to indicate an intent to have organizations funded under the Act retain the ability to engage in the work that they normally do, and such work could include activities that the Government is now construing as inconsistent with a policy against prostitution.

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women who are the victims of trafficking play an important role in preventing the spread of HIV/AIDS. We need to support these organizations, because HIV transmission through this type of behavior is widespread in many parts of the world. At the same time, we do not want to condone, either directly or indirectly, prostitution or sex trafficking. Both are abhorrent.

I believe the answer is to include a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women. Such a statement, as part of the contract or grant agreement, would satisfy the intent of this provision.

Mr. LEAHY: I thank the majority leader. I think that is important, because we do not want to impose requirements which have the unintended result of impeding the ability of these organizations to do their work, or interfering with our ability to support them.

149 Cong. Rec. S6451-01, S6457 (daily ed. May 15, 2003).

Yet a closer look reveals that Senator Frist's words are not inconsistent with the Government's position.

First, neither senator discusses the effect of the provision on organizations whose work includes advocating legalization or promotion of prostitution. Instead, Senator Leahy mentions other types of work organizations perform on behalf of women involved in prostitution—"educat[ing]" and "counsel[ing]," "help[ing] them escape," and "provid[ing] them with condoms"—and Senator Frist agrees that "these organizations" play an important role in preventing the spread of HIV/AIDS and should be supported. The passage does not address whether these organizations could advocate for the legalization of prostitution or, for example, unionization of prostitutes and remain consistent with a policy explicitly opposing prostitution. Second, the exchange simply does not speak to the issue of public versus private funding, and whether such organizations could retain the freedom to engage in certain activities with their own funds that they could not with federal funds.[23]

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[23] Moreover, other legislative history suggests an intent to deny funding to groups advocating for legalization of prostitution. The Policy Requirement was first added to the legislation by way of amendment during the bill's markup session in the House Committee on International Relations. Representative Christopher Smith, introducing the amendment, described his concerns regarding individuals working on HIV/AIDS prevention issues in both the government and the private sector who "feel that legalizing prostitution and focusing primarily on safe sex . . . is a solution." *United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003: Markup Before the Committee on International Relations, House of Representatives*, 108th Cong. 148–49 (Apr. 2, 2003) (hereinafter "Markup Report"). Representative Smith summarized the choice to adopt his amendment as "whether or not we will provide money to organizations that seek the legalization of prostitution." *Id.* He further noted that the amendment

d. *Draining Other Provisions of Meaning*

Plaintiffs point to several other provisions of the statute and argue that their reading is necessary to prevent those other provisions from being drained of meaning or becoming superfluous. The Court finds none of these arguments persuasive.

i. *Superfluous Provisions*

Plaintiffs argue that interpreting § 7631(f)'s Policy Requirement to encompass an organization's program activities would render § 7631(e) superfluous. According to this reasoning, if § 7631(f) barred specific activities deemed to be inconsistent with a general policy stance

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did "not state that prostitutes and trafficked women should not be treated for AIDS." *Id.* Before the committee voted on the amendment, Representative Smith answered questions from another committee member, Representative Berman, about the purpose of the restriction and whether it was designed to limit the ability of an organization to provide AIDS treatment to individuals engaged in prostitution. Representative Smith responded that the purpose of the amendment was to ensure that "organizations that seek to provide that kind of assistance make it clear that they are not trying to legalize prostitution or legalize sex trafficking, which is obviously a heinous practice." *Id.*

The Court is mindful that, while markup sessions are part of the legislative history, *see Regan v. Wald*, 468 U.S. 222, 238, 104 S. Ct. 3026, 82 L. Ed. 2d 171 (1984), their weight may not be decisive, *see Becton, Dickinson & Co. v. F.D.A.*, 589 F.2d 1175, 1182 n.6 (2d Cir. 1978) (rejecting FDA's attempt to rely on markup session excerpts, because "the gap between such committee room interchanges and the intent of the legislature is generally too wide"). Nonetheless, the markup session merits mention to the extent that, at least as reflected in the recorded expressions of other members of Congress, it contradicts Plaintiffs' proposed interpretation of the Policy Requirement based only on Senator Frist's statement on the floor, and further suggests that the meaning of the Policy Requirement is not as straightforward as Plaintiffs claim.

opposing prostitution, this prohibition would necessarily encompass advocating for the legalization and practice of prostitution—including using government funds to so advocate. Thus, § 7631(e)'s ban on using government funds to promote the legalization and practice of prostitution would be rendered unnecessary, as such a ban already would be encompassed by § 7631(f). The Court rejects this reading of the statute.

Certain canons of construction counsel courts to interpret statutes in a way that avoids rendering any language superfluous, and "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) (*quoting United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 99 L. Ed. 615 (1955) (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S. Ct. 391, 27 L. Ed. 431 (1883))) (internal quotation marks omitted); *Collazos v. United States*, 368 F.3d 190, 199 (2d Cir. 2004). At the same time, the Court is mindful that canons of construction "are not mandatory rules" that trump other evidence, reasoning and common sense. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001). Particular canons of statutory construction "'should not take precedence over more convincing reasons.'" *Krause v. Titleserv, Inc.*, 402 F.3d 119, 128 (2d Cir. 2005) (*quoting Hakala v. Deutsche Bank AG*, 343 F.3d 111, 116 (2d Cir. 2003)). Even the preference for avoiding surplusage construction "'is not absolute.'" *Id.* (*quoting Lamie v. U.S. Tr.*, 540 U.S. 526, 536, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)). For example, adopting the plain meaning of statutory language with the result that some language is superfluous is preferable to adopting an ambiguous

meaning where there is no surplusage. *See Lamie*, 540 U.S. at 536, 124 S. Ct. 1023. Similarly, other evidence of congressional intent can overcome the force of an interpretive canon. *See Chickasaw Nation*, 534 U.S. at 94, 122 S. Ct. 528.

Most relevant to this analysis, the Court notes that when construing a statute, the general preference against surplusage is constrained by the requirement that a construction avoiding surplusage must be a reasonable one. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08, 81 S. Ct. 1579, 6 L. Ed. 2d 859 (1961) ("The statute admits a *reasonable* construction which gives effect to all of its provisions. In these circumstances we will not adopt a strained reading which renders one part a mere redundancy.") (emphasis added). Thus, even if the Court's reading resulted in some redundancy in the statute, such redundancy—which may simply reinforce Congress's message—would not be a reason to choose a reading that simply was not plausible. The Court has already determined, for the reasons discussed above grounded on statutory text and legislative intent, that Plaintiffs' construction of the meaning of "policy," while ostensibly designed to avoid rendering § 7631(e) superfluous, is simply not plausible.

Here, however, the Court need not worry about choosing between an interpretation that strains logic but avoids surplusage, and one that is more logical but may ostensibly contain surplusage. Instead, the Court offers two plausible readings of the statute, each of which gives effect to every clause. *See Duncan*, 533 U.S. at 174, 121 S. Ct. 2120.

First, Congress could, as a matter of policy, choose to identify one form of activity that it determines is more offensive and harmful than others, and therefore more worthy of an expression of its disapproval highlighted in a separate provision of the statute, without needing to enumerate every other activity that may be inconsistent with the legislative purpose, or foreclosing subsequent determinations of other such activities pursuant to a more general delegation of authority to the statute's administering agency. Such drafting technique is not uncommon, and is ordinarily employed in legislation that lays out either broad terms or particular priorities and leaves to the implementing agencies the task of filling in further details and proscriptions by appropriate regulations. Thus, in § 7631(e) Congress could have chosen to specify one form of activity (spending government funds for the legalization of prostitution) it deemed merited special proscription as an articulation of the significance Congress attached to barring that activity, without precluding limitations on other activities (*e.g.*, advocating for the legalization of prostitution as an organization that is acting in some capacity as a government partner in the global fight against HIV/AIDS) imposed by the more general administrative means provided in § 7631(f).

Second, § 7631(e) and § 7631(f) could be interpreted as addressing two different points in time in the grant of funds to organizations under the Act. Section 7631(f) may be viewed as providing an eligibility criterion defining which organizations qualify to apply for and receive funds, while § 7631(e) restricts specific activities for which Act funds could not be used after the grant is made, a violation of which presumably could warrant

termination of a contract. Thus, viewed temporally, § 7631(f) stands as a first cut-off in the grant-seeking process: only those organizations with a policy expressly opposing prostitution are eligible to receive contracts. The prohibition of § 7631(e) would come into play, if called for, after the organizations have been selected to receive federal funds. In other words, the provision imposes a condition on the use of those funds: that they not be expended to promote or advocate the legalization or practice of prostitution. This reading of the statute—an eligibility restriction and a funding restriction—does not render § 7631(e) superfluous and is better supported by legislative and administrative reasons than the more strained reading Plaintiffs advance.

Read in either way suggested, each provision of the statute would be given effect, although this course raises other problems. As will be discussed below, if the Policy Requirement of § 7631(f) is read as an eligibility restriction demanding that organizations adopt a policy that encompasses speech activities carried out with their private funds to qualify for receipt of federal funds, such a condition could infringe on the organizations' First Amendment rights. This issue is addressed in Section IV.A.2 of this opinion.

ii. *Other Provisions*

(a) *"Moral Objection"*

Plaintiffs also contend that the Government's reading of the Policy Requirement would undermine § 7631(d), under which organizations that are "otherwise eligible to receive assistance . . . shall not be required, as a condition of receiving the assistance, . . . to partic-

ipate in a prevention method or treatment program to which the organization has a religious or moral objection." 22 U.S.C. § 7631(d). According to Plaintiffs, since they have adopted governing principles that require them to "treat socially marginalized groups in a manner that does not marginalize them further," requiring Plaintiffs to explicitly oppose prostitution would force them to treat prostitutes in a way contrary to Plaintiffs' moral values. (*See* Pl. Mem. at 18.)

The Court is not persuaded by this argument. First, Plaintiffs do not specify how the restriction forces them to participate in a "prevention or treatment" method or how this conflicts with a "moral" value. Second, Plaintiffs' argument suggests that this provision is subject to open interpretation by all potential grantees, and that the phrase "moral value" may be given any content that Plaintiffs propose. Such a framework, however, has the potential to render the entire restriction meaningless, and thus cannot be adopted by this Court.

(b) *Palliative and Prophylactic Care*

Plaintiffs also point to an exclusion for palliative and prophylactic care in the government funding restriction: after imposing its restrictions on the use of government funds, § 7631(e) states:

> Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

22 U.S.C. § 7631(e). According to Plaintiffs, interpreting § 7631(f)'s Policy Requirement to cover specific activities of the organization could render this portion of § 7631(e) meaningless, apparently on the theory that activities within the scope of the exclusion could "evince an insufficient opposition to prostitution" and thus be barred by § 7631(f). There is nothing on the record before the Court to support such a reading of the § 7631(e) exclusion. Plaintiffs point to no statement by Defendants indicating that providing the specific types of care in question would be construed as not sufficiently opposing prostitution. Indeed, insofar as legislative history and intent with regard to this issue is not ambiguous or contradicted, the sponsor of the amendment in the markup session observed that "[i]t does not state that prostitutes and trafficked women should not be treated for AIDS" and that language elsewhere in the bill "points out that nothing in this act shall be construed to preclude the provision to individuals of palliative treatment or postexposure pharmaceuticals, including the distribution of condoms, and it goes on, in brothels and places of that sort." *Markup Report* at 149 (comments of Rep. Smith, member, House Committee on International Relations).

(c) *Specific Restriction in § 7631(e)*

Finally, Plaintiffs argue that when Congress wanted to bar particular activities in the Act, it did so explicitly. Plaintiffs point to the language in § 7631(e) expressly forbidding grant recipients from using federal money "to promote or advocate the legalization or practice of prostitution." The absence of a similarly specified set of activities in § 7631(f) indicates, according to Plaintiffs,

that Congress did not intend the Policy Requirement to encompass such activities.

The Court disagrees. As discussed above in the Court's reconciliation of § 7631(e) and § 7631(f), that Congress, in § 7631(e), specifically delineated activities prohibited with government funds, does not necessarily mean that it intended, through the absence of a similarly delineated list of activities in § 7631(f), to condone or allow for such activities. The phrase "policy expressly opposing prostitution" is broad and general. Why this phrase was left undefined is unclear: perhaps it was a legislative compromise; perhaps Congress felt the details of what this term should encompass were best left to the administering agencies to elaborate in regulations; perhaps the more general language was designed to avoid the very constitutional issues now before this Court. It is difficult to divine the congressional intent behind the absence of a more precisely contoured definition of a statutory term. However, the absence of a specifically listed activity in one section of the statute does not mean that the broad phrase "policy explicitly opposing prostitution" does not, or cannot, encompass that activity.

e. *Doctrine of Constitutional Avoidance and Deference to Agency Interpretation*

Finally, Plaintiffs argue that, pursuant to the canon of constitutional avoidance, the Court should adopt their reading of the Policy Requirement and not needlessly reach the constitutional questions potentially implicated in the case. Specifically, Plaintiffs argue that Defendants' construction of the Policy Requirement, by allowing the Government to regulate and restrict privately

funded speech and associational activities on a viewpoint discriminatory basis, impinges upon organizations' First Amendment free speech rights. Moreover, requiring organizations to adopt a policy, according to Plaintiffs, impermissibly compels speech in violation of the First Amendment. Plaintiffs urge that their construction, by allowing organizations to conduct activities as they see fit, avoids this constitutional quagmire. The Court rejects Plaintiffs' argument. To save a statute from unconstitutionality, "every *reasonable* construction must be resorted to." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) (*quoting Hooper v. California*, 155 U.S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (1895)); but, as already discussed, Plaintiffs' interpretation simply is not viable or reasonable.[24]

For their part, Defendants argue that their construction of the provision should be granted deference,[25] as

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[24] The Court also notes that even requiring just a "statement" potentially raises constitutional issues regarding compelled speech, and thus that Plaintiffs' interpretation, strained though it may be, does not avoid constitutional issues.

[25] The Agencies' interpretation in this case would not be entitled to full deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), but only "some deference," since the reading and application of the statute were not subject to formal notice-and-comment procedures pursuant to the Administrative Procedure Act, but rather, set forth in ad-hoc determinations and correspondence from agency staff who may or may not even have the authority to make policy or offer administrative interpretations of the Act on behalf of any of the Agencies. *See Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995) (agency's interpretation appearing only in an internal agency guideline, rather than in published regulations subject to public notice and comment was entitled to "some deference" because it was a "'permissible

they are the agencies entrusted to administer the statutory scheme. With regard to Defendants' argument, the Court finds that while their construction of the meaning of the term "policy" is not an unreasonable reading of the Act, the Court still cannot defer to the Government's interpretation of the Policy Requirement because of the significant constitutional problems, discussed at length in Section IV.A.2 of this opinion, to which such a construction gives rise. Where an agency's interpretation of a statute raises significant constitutional issues, a court need not defer to that reading absent a clear indication from Congress that such interpretation was intended. *See Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173-74, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) (finding that deference was inappropriate because the agency's interpretation "invoke[d] the outer limits of Congress' power" under the Commerce Clause by "permitting federal encroachment upon a traditional state power," thus "rais[ing] significant constitutional questions" without a "clear statement from Congress" that it intended this result); *see also Miller v. Johnson*, 515 U.S. 900, 923, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) ("[W]e think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act. Although we have deferred to the Department's interpretation in certain statutory cases . . . we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions."); *DeBartolo*, 485 U.S. at 574-75, 108 S. Ct. 1392.

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construction of the statute'" (*quoting Chevron*, 476 U.S. at 843, 106 S. Ct. 2224)).

Since Defendants' construction of the statute as it relates to the Policy Requirement raises significant constitutional questions—indeed, as discussed below, it goes beyond the outer limits of what the Supreme Court has found acceptable in its line of "unconstitutional conditions" cases—the Court can not defer to this interpretation. There is no clear evidence that Congress intended to restrict entirely a recipient organization's ability to express certain viewpoints, even through its privately funded activities, nor is there clear evidence of what is meant by a "policy expressly opposing prostitution." Without a clear indication of Congressional intent in this regard in the statutory text or in compelling legislative history, the Court will not conclude that Congress intended an unconstitutional result. *See Velazquez I*, 164 F.3d at 764 ("While the legislative history may give some support to the view that Congress intended to prevent grantees from creating affiliates to undertake restricted activity, the statutory text is silent on the point. We conclude that the LSC regulations are not inconsistent with or unauthorized by the terms of the Act."). The Government's interpretation of the Policy Requirement as applied to the private speech of recipients of funds under the Act, is not a constitutionally permissible construction of the statute, and the Court cannot defer to it.

Thus, in order to determine whether Plaintiffs are entitled to an injunction restraining the Defendants' interpretation of the statute, the Court turns to Plaintiffs' constitutional arguments.

2. *First Amendment Claims*

a. *Applicable Standard of Review*

Not surprisingly, since much of the resolution of this proceeding turns on which standard of review the Court should apply in reviewing the constitutionality of the statute, the parties have devoted considerable energy to their arguments concerning this question. Plaintiffs contend that the statute unduly burdens their First Amendment rights by constraining use of their private funds as a condition of receiving or maintaining federal program benefits, and thus implicates the unconstitutional conditions doctrine. Because the statute requires them to refrain from engaging in certain privately funded speech and further compels them to adopt a policy espousing a specific government formulated or endorsed viewpoint on prostitution, Plaintiffs argue that review of the statute must be subject to heightened scrutiny.

In contrast, the Government argues that the Act is an enactment pursuant to Congress's authority deriving from the Spending Clause of the Constitution, Art. I, § 8, cl. 1.1, under the jurisprudence of which the Policy Requirement does not impose any unconstitutional conditions because the Government has no obligation to subsidize the activities in question, and Plaintiffs are under no compunction to receive funds under the Act. Plaintiffs may apply for such financing, but remain at liberty to turn down any contract awarded at any time they cannot comply with the Policy Requirement. In that event, if they wish, Plaintiffs can still speak freely on approaches to prostitution or any other matter. The Government thus claims that because the statute was

enacted pursuant to Congress's spending power, it is subject to only rational basis review.

In addressing these arguments, the Court is mindful of the historical context and policy considerations that surround analysis of First Amendment issues. As the Supreme Court has observed, "[i]t is fundamental that the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) ("*Velazquez II*") (internal quotations omitted); *c.f. United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (noting that the interest protected by the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection").

Bearing these points in mind, the Court concludes that when the government carries out its powers, including those emanating from the Spending Clause, in a manner whose substantial purpose or effect is to guide or burden choice by recipients of government benefits in the exercise of First Amendment freedoms so as to endorse the viewpoint the government favors or prescribes, such action distinguishes the case from other invocations of the Spending Clause power (*e.g.*, strictly for economic regulation) and indeed demands a heightened level of scrutiny. For the reasons set forth below, the Court is persuaded that this case falls within the unconstitutional conditions framework, and that, while the Act is undoubtedly a Spending Clause enactment, that consideration alone does not spare from heightened scrutiny the statute's imposition on Plaintiffs' First

Amendment freedoms. Before turning to its reasons for this determination, the Court will provide a brief overview of both the Spending Clause power and the unconstitutional conditions doctrine. It will then discuss the application of these doctrines to the instant case.

i. *Congress's Power Pursuant to the Spending Clause*

Under the Constitution, Congress is empowered to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general welfare of the United States." U.S. Const., Art. I, § 8, cl. 1.1. The Supreme Court has recognized that this provision, known as the Spending Clause, allows Congress to "attach conditions on the receipt of federal funds, and [Congress] has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (*quoting Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980)). Congress's power pursuant to the Spending Clause is broad, and "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Id.* at 209, 107 S. Ct. 2793. Because recipients of government funds allocated pursuant to Congress's spending power retain the ability to reject the funds offered to them, and thus not assume any restrictions attached to the funds that they deem unduly burdensome, such conditions are generally subject to less scrutiny than legislation imposing direct regulation. *See, e.g., id.* at 207, 107 S. Ct. 2793.

ii. *Overview of Unconstitutional Conditions Doctrine*

Despite the well established broad authority Congress possesses under the Spending Clause, the Supreme Court has recognized that while the government may attach conditions to financial and other benefits, there are limitations as to what these conditions may require. Succinctly framed, the doctrine holds that the government can not place conditions on its granting of public benefits or subsidies that cause the recipient to surrender vital constitutional rights, even if the government has no obligation to provide the benefit and thus could withhold it altogether. As the Court recently reiterated in *Rumsfeld v. Forum for Academic and Institutional Rights*, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." __ U.S. __, 126 S. Ct. 1297, 1307, 164 L. Ed. 2d 156 (2006) ("*FAIR*") (*quoting United States v. American Library Ass'n*, 539 U.S. 194, 210, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003)).

The Supreme Court's decision in the seminal unconstitutional conditions case, *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), embodies this principle. There, the Court held unconstitutional California's decision to deny a property tax exemption to veterans who refused to declare that they would not advocate for the overthrow of the government. *Id.* The Court found unacceptable the deterrent effect on speech that the tax provision would cause, noting that "to deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.* at 518, 78 S. Ct. 1332.

Numerous subsequent Supreme Court decisions reflect this doctrine, reiterating *Speiser*' s rejection of the contention that government may condition the acceptance of a public benefit on the curtailment of a constitutional right. In *Perry v. Sindermann*, the Court, in considering the claim of a state university professor that the university's failure to renew his contract was motivated by retaliation for his criticism of the university's governing board, noted that "even though the government may deny [a] . . . benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *see also Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) (FCC not permitted to condition receipt of federal funds for public radio and television stations on the banning of editorial content in the broadcasts of those stations); *cf. Rust v. Sullivan*, 500 U.S. 173, 196, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (upholding federal government funded family planning program's restriction on abortion related speech because the regulations did not "force the [government program] grantee to give up abortion related speech [but rather] merely require that the grantee keep such activities separate and distinct from the [government program activities]").

This doctrine, while seemingly straightforward when stated in the abstract, in practice has proven difficult to apply. The Supreme Court's line of unconstitutional conditions cases has been recognized as a "troubled area

of [Supreme Court] jurisprudence in which a court ought not entangle itself unnecessarily." *Rust*, 500 U.S. at 205, 111 S. Ct. 1759 (Blackmun, J. dissenting) (*citing* Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L.Rev. 4, 6 (1988) (describing this problem as "the basic structural issue that for over a hundred years has bedeviled courts and commentators alike")). The demarcation between an acceptable exercise of state power, or implementation of a selective fiscal provision pursuant to Congress's authority under the Spending Clause, and an unconstitutional condition, has proven to be a blurred and shifting line.

iii. *Determination of the Applicable Standard*

Because of the lack of clarity as to the contours of the unconstitutional conditions doctrine, both Plaintiffs and Defendants are able to summon germane authority to bolster their respective contentions with regard to the applicable standard of review. Plaintiffs, in support of their argument that the court should apply a heightened standard, point to *League of Women Voters*. There, the Supreme Court, in striking down a federal funding restriction, noted that while the government had a "substantial interest" in the legislation's purpose, the interest could be "fully satisfied by less restrictive means that are readily available." 468 U.S. at 395, 104 S. Ct. 3106. Plaintiffs also point to the Second Circuit decision in *Velazquez I*, which suggested, in dictum,[26] that even

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[26] In *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 600 (E.D. N.Y. 2004) ("*Velazquez III*"), the court suggested that the Circuit Court's adoption of the undue burden standard in *Velazquez I*, while dictum, merits close attention. Characterizing it as "judicial dictum" rather than mere "obiter dictum," *id.* at 600, the court concluded that the Circuit Court's dictum was intended to guide the lower courts and

when funding restrictions affecting private funds afford alternative avenues for expression, the restriction still must not be "unduly burdensome."[27] 164 F.3d at 767.

For their part, Defendants point to *Regan v. Taxation with Representation*, in support of their argument that a rational basis test is all that is required when analyzing restrictions on government funding benefits. *See* 461 U.S. 540, 550, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) ("It is not irrational for Congress to decide that tax-exempt charities such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying."). Defendants further contend that because funding conditions are voluntarily assumed, and could be avoided entirely by simply not requesting or turning down conditioned government funds, the constraints imposed on First Amendment freedoms are considerably less demanding due to their consensual basis. Following this point, the Government argues that where Congress exercises its spending power to require that grant recipients comply with conditions imposed by federal policy, *Dole*, and its rational relationship test, provide the appropriate framework for analysis. As further support for this proposition the Government points to *American Library Association*, which applied *Dole* as the appropriate analytical framework, while noting that the challenged act did not di-

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"'must be given considerable weight and can not be ignored in the resolution of [a] close question,'" *id.* at 582 (*quoting United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975)).

[27] The Second Circuit's pronouncement, though dictum, derives support from the Supreme Court's decision in *Regan v. Taxation with Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), as discussed in Section IV.A.2.a of this opinion, *infra*.

rectly regulate private activity, but rather reflected the exercise of Congress's spending power "by specifying conditions on the receipt of federal funds." 539 U.S. at 203 n. 2, 123 S. Ct. 2297.

Drawing from these cases, the Government invokes several basic principles that generally guide the determination of the appropriate standard of review in cases involving the unconstitutional conditions doctrine. Specifically, the Government asserts that deferential review is applicable here because: (1) Congress has no obligation to provide a subsidy, and if it elects to do so it may require conditions consistent with the statutory purpose—an expression of the concept that the larger power to withhold a public benefit or subsidy that is a matter of grace encompasses the lesser power to impose conditions on its acceptance; (2) the recipients of funds under the Act are entirely free to accept or reject the grants, thus compliance with the Policy Requirement does not involve any form of coercion or penalty on the exercise of the beneficiaries' First Amendment rights, nor does it entail an attempt by the Government to suppress dangerous ideas; (3) the Policy Requirement is germane to the purposes of the Act and Congress's reasons for the imposition of the condition, and consequently the Government does not thereby seek to exact a price for the surrender of protected speech.

It is the Court's task to determine where in the murky borderlands between Congress's Spending Clause power and the unconstitutional conditions doctrine the instant case lies. Confirming the muddle this Court has already noted in this area of law, another court has similarly observed that "determining the constitutionality of government subsidization of expression is one of the

most frustrating tasks of the First Amendment." *Legal Aid Society of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1412 (D. Haw. 1997) (*quoting* Martin H. Redish and Daryl Kessler, *Government Subsidies and Free Expression*, 80 Minn L.Rev. 543, 544 (1996)). That said, in the instant case the Court is persuaded that Defendants' interpretation of the statute as applied to Plaintiffs' privately funded speech activities falls squarely beyond what the Supreme Court has permitted to date as conditions of government financing.

To be sure, the multiple dimensions and articulations of the unconstitutional conditions doctrine reflect the particular principles the Government cites. But the jurisprudence also embodies other rules and guidance that weaken the force of the Government's legal theories in this regard, or render them inapt. The Court finds these considerations more compelling in determining whether a minimal or heightened standard of review applies here.

First, with regard to the point that governmental power to deny a subsidy implies the power to condition its acceptance, while undoubtedly a truism, the principle by itself falls short of the broader conception of the unconstitutional conditions doctrine that has emerged from the most recent Supreme Court jurisprudence, which is summarized below. In response to this principle, these cases implicitly embody a countervailing view central to the modern doctrine: that the government should not be permitted to do indirectly what it may not properly do directly. *See, e.g., Speiser*, 357 U.S. at 527, 78 S. Ct. 1332 (noting that the government cannot manipulate the

denial of benefits in order to "produce a result which it could not command directly").[28]

Concerning the coercion/penalty principle, certain conditions imposed on the acceptance of government grants may not appear as coercion or penalty in a strict sense of the words, in part because the concepts embody a subjective value judgment dimension that cannot readily be expressed in objective terms; nor can the quality be empirically demonstrated by the extreme intentional wrongful conduct ordinarily associated with coercion or penalties when all that is involved in the governmental action is a decision not to provide a discretionary subsidy. Absent recognized norms, distinctions between what is and is not coercive to particular individuals or in particular circumstances are often difficult to draw.[29]

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[28] Of course this point is nuanced in the context of a challenge to a Spending Clause enactment, as *Dole* explicitly provides that Congress can attempt to achieve certain ends through spending enactments that it would not be able to directly. Nonetheless, while the spending power may be broad, it is certainly not unlimited, and its constraints include the First Amendment. *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-90, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (stating that "the First Amendment certainly has application in the subsidy context," while noting that, pursuant to the spending power, "the Government may allocate competitive funding accordingly to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.") The continued applicability of the First Amendment, and its limitations on the Government's ability to impose restrictions on the rights it protects, was implicitly affirmed by the Supreme Court in *Velazquez II*, which struck down, without discussion of the Spending Clause or *Dole*, a restriction on federally funded speech. *See* 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63.

[29] In *Dole*, the Supreme Court acknowledged that in "some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion," while

More significant and compelling to the standard of review, however, is that, as the Supreme Court has noted, government conditions on public benefits need not be inherently coercive to constitute an impermissible burden on the exercise of constitutional liberties. *See, e.g., United States v. Jackson*, 390 U.S. 570, 583, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

Turning to the Government's germaneness argument, the principle holds that, to pass muster, attaching a government condition that burdens constitutional rights to a public benefit must bear a sufficient relationship to the interests the government would serve by denying the subsidy. *See Dole*, 483 U.S. at 207, 209, 107 S. Ct. 2793 (noting that conditions on federal funds "might be illegitimate if they are unrelated to the federal interest in particular national projects or programs" but, finding the challenged provision before it directly related to one of the main purposes of the expenditure, declining to determine "whether conditions less directly

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also recognizing that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." 483 U.S. at 211, 107 S. Ct. 2793 (*citing Steward Machine Co. v. Davis*, 301 U.S. 548, 590-91, 57 S. Ct. 883, 81 L. Ed. 1279 (1937)). As is discussed above, it is the drawing of lines between coercion and temptation that is so perplexing and subjective. *Speiser*, for example, refers to 'coercion' in describing the effect of the tax benefit provision at issue in that case. *See* 357 U.S. at 519, 78 S. Ct. 1332 (noting that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of *coercing* the claimants to refrain from the proscribed speech") (emphasis added). In *Dole*, the Court found that the spending enactment in question was not so coercive as to require invalidation because, under the enactment, a state that refused to comply with Congress's condition would lose only five percent of the funds otherwise obtainable, a condition which the Court considered to be "relatively mild encouragement." 483 U.S. at 211, 107 S. Ct. 2793.

related to the particular purpose of the expenditure might be outside the bounds of the spending power") (internal citation omitted); *National Amusements v. Town of Dedham*, 43 F.3d 731, 747 (1st Cir. 1995) (*citing* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L.Rev. 1415, 1465 (1989)). On this basis, the lesser the degree of relatedness the greater the level of scrutiny accorded to the enactment, even if the grantee were free to accept or reject the government funds. The rationale largely grounding the germaneness theory is that a condition that promotes a governmental interest unrelated to any reason that would justify denial of the public benefit is tantamount to an impermissible penalty on the exercise of a constitutional right. *C.f. Regan*, 461 U.S. at 544-45, 103 S. Ct. 1997 (upholding restriction on use of non-profit organization's tax deductible contributions for lobbying, in part because the tax code did not create situation in which charitable organizations were prevented from receiving tax deductible funds for all activities because they engaged in lobbying).

This rule as reason to guide a proper standard of review determination in this case, though a useful consideration, falls short as well. For, in essence the relatedness inquiry focuses more on the legitimacy of the governmental process that produces the challenged condition than on the systemic effect of an impermissible enactment on two larger values: the recipient's free speech rights, as well as the overarching constitutional scheme by which our society is governed. In other words, it primarily addresses the propriety of the legislative warrant for the law rather than the asserted burden on protected speech and the larger implications of an unconstitutional enactment. In emphasizing the va-

lidity of legislative reasons supporting an enactment—sometimes articulated, at other times not—this principle necessarily relaxes the starting point for constitutional inquiry, thus potentially skewing the outcome.

This analytic shortcoming is especially evident in the case of a dual-edged condition on a government benefit such as the one in contention in the case at hand. Here, it is true that the government has authorized funds for programs it is not obligated to subsidize, and that the recipients are free to take or leave this public privilege. To that extent, therefore, the issue before the Court is not the validity of a Policy Requirement as enacted and applied in general to the expenditure of public funds. More to the point is that the government seeks to extend an otherwise permissible condition to restrict activities carried out entirely with the recipient's private funds. From this perspective, the limitation would place a larger burden on some grantees, while effectively favoring others. In particular, the restriction would place at a disadvantage organizations that would not only be required to pledge to a viewpoint and to program strategies with which they may fundamentally disagree, but also potentially thereby to violate other commitments governing their private funds, and to place those resources at risk.

Accordingly, while on its face part of the hybrid condition may pass the relatedness test and thus not properly be deemed a penalty as imposed on a recipient's use of government funds, it falters and raises more far-reaching implications regarding congressional purpose when applied to inhibit activities privately financed. In the latter case the condition/benefit relationship attenuates and the restriction shades into the suspect domain

of what Supreme Court doctrine deems an impermissible penalty.

The deficiencies of the various theories the parties advance as rules of decision controlling the choice of an appropriate standard of review in this case prompts the Court to suggest another analytical approach. This construct incorporates, as appropriate, the traditional unconstitutional conditions principles described above, but places them in a larger framework of free speech rights and the role of the First Amendment in our governmental scheme. Central to this broader inquiry are several tenets. As a point of departure, freedom to enjoy preferred liberties presupposes the right to make choices about their exercise uninhibited by government duress, penalty, discrimination or other forms of undue encumbrances. At the core of this principle, standing as a fulcrum of our democracy, is the power relationship between the state and the people in American society. The government is entrusted with vast resources, with which it could exercise power to harm or to lift any member of society. In turn, the individual possesses certain constitutional rights to safeguard against abuse of the government's delegated authority and to enable enjoyment of the personal liberties constitutionally conferred on the people. Thus, in recognition of the disproportionate means bestowed on the state in our governmental plan, the First Amendment stands as a source of constitutional protections which serves to establish and maintain that power alignment between the state and its citizenry finely balanced at all times. It safeguards the individual's right to speak, by free choice, either in accordance with the government's position or in a dissonant voice.

For the so-called "marketplace of ideas" that is vital for a free society to function properly and to flourish, sustaining the people-to-government power equilibrium as constitutionally calibrated demands a number of checks long recognized in First Amendment jurisprudence. In its dealings with the individual, and in response to the legitimate private viewpoints competing in the public debate about major issues, the government should be evenhanded. It should assume a stance of neutrality as regards what people believe, and not discriminate among privately held viewpoints, nor compel its own message in a manner that unduly enhances one person and burdens another. In sum, the government should not throw its immense delegated weight into the public arena through strategies and means that improperly arrogate or shift public power, in particular when the net consequence may be to promote the government's own view at the expense of other perspectives, to distort political ties as between the state and each individual, or to upset the societal standings of particular individuals or groups relative to one another.

In this context, conditions on receipt of government funds, even if recipients remain free to accept or reject the grants, become constitutionally suspect, and demand enhanced scrutiny, if the purpose or effect of the allocation of the public resources and benefits would substantially alter choice of private speech and materially disrupt the power equilibrium of which the First Amendment functions as centerpoint. Such imbalances could occur, for example, through (1) encumbrance of the individual's ability to exercise private and independent choice in expressing private points of view, *see, e.g., League of Women Voters,* 468 U.S. at 400-01, 104 S. Ct.

3106; (2) elevation of the majority view and, conversely, suppression of minority "dangerous" ideas, *see e.g.*, *Speiser*, 357 U.S. at 519, 78 S. Ct. 1332; (3) selections among recipients of public subsidies that favor and strengthen those friendly to the government's message while placing at a disadvantage and thus weakening the opponents and skeptics. Through these means the government would give legitimacy to some while invalidating other beneficiaries. It would also enhance the value of some perspectives at the expense of others, deterring some and encouraging others by inducing compliance, effectively thereby putting a bounty on the exercise of constitutional rights. In each of these instances, the government's intervention would carry the substantial likelihood to redirect the choice of speech that a recipient might otherwise feel entirely uninhibited to make, and by the use of such inducements derived from its vast resources, to tilt the public power equilibrium to the choice of view the government elects to favor. The constitutional risks associated with any such material disruptions of the people-to-government relationship, and substantial power shifts in First Amendment values they could engender, would warrant closer scrutiny of the government action at issue.

The Supreme Court has spoken most pointedly to the unconstitutional conditions issue before this Court in terms that support the approach described above in three cases: *Regan*, *League of Women Voters*, and *Rust*. Analysis of these cases supports the conclusion that an uninhibited Spending Clause rational basis standard, as here urged by the Government, is inapt. The Government's arguments ultimately fail to adequately consider the substantial impediment the Policy Requirement im-

poses on Plaintiffs' speech with regard to their use of *non-federal* funds, in effect foreclosing for Plaintiffs any alternative channel through which to express a differing viewpoint. As underscored below, to that extent the condition would unduly disrupt the public power relationship the First Amendment seeks to maintain appropriately balanced. A careful reading of *Regan*, *League of Women Voters*, and *Rust* compels the result that, despite the broad powers Congress is granted by the Spending Clause, when a spending enactment substantially impairs First Amendment protected activity conducted by private entities with private funds as a condition of receiving a government benefit, heightened scrutiny is warranted.

In *Regan*, the Supreme Court upheld a challenge to section 501(c)(3) ("§ 501(c)(3)") of the Internal Revenue Code ("IRC"), which provided that charitable organizations engaged in lobbying could not receive tax-deductible contributions. The Court upheld the provision, applying minimal scrutiny in doing so because the provision did not reflect an attempt by Congress to invidiously discriminate in allocating its subsidies in a way designed to suppress ideas the government deems dangerous, as was the case in *Speiser*. As noted above, the Court observed that the IRC allowed § 501(c)(3) organizations to lobby the government through financially independent but affiliated organizations under § 501(c)(4), as long as records were kept to ensure that no tax deductible contributions were used for lobbying purposes. *See Regan*, 461 U.S. at 544, 103 S. Ct. 1997. In his concurring opinion, Justice Blackmun relied on the organization's ability to continue to lobby through a § 501(c)(4) affiliate in upholding the IRC provision, and noted that

without this constitutional safety valve § 501(c)(3) alone would be "constitutional[ly] defect[ive]." *Id.* at 552, 103 S. Ct. 1997.

In *League of Women Voters,* the case that Plaintiffs argue is controlling here, the Supreme Court found unconstitutional a provision denying federal funds to public broadcasting stations that engaged in editorializing. The Court found it problematic that "in contrast to the appellee in *Taxation With Representation* . . . a station [that receives only one percent of its annual income from the federal government] is not able to segregate its activities according to the source of its funding. The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity." 468 U.S. at 400, 104 S. Ct. 3106. Most apt to the circumstances of the case at hand, the Court further stated that if Congress were to adopt a revised version of the statute that permitted noncommercial stations to establish affiliate stations which could editorialize with non-federal funds, this mechanism "would plainly be valid." *Id.*

In *Rust,* recipients of family planning funds under Title X of the Public Health Services Act brought suit challenging the HHS's regulations implementing the statute. The regulations prohibited those receiving Title X funds from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. Also particularly germane to the instant controversy, the agency's detailed regulations, fully developed after extensive public proceedings, required that funding recipients maintain "program integrity" between facilities, personnel, and records for Title X pro-

viders and any medical providers of abortion related information or services. *Rust*, 500 U.S. at 180-81, 111 S. Ct. 1759. The Supreme Court upheld the regulations, doing so while explicitly citing as a consideration the ability of grant recipients to communicate abortion related messages through non-Title X programs. On this point, the Court stated:

> Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. The grantee, which normally is a healthcare organization, may receive funds from a variety of sources for a variety of purposes . . . The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project . . . The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities.

Id. at 196, 111 S. Ct. 1759 (emphasis in original). Because the grant recipients remained able to engage in "the protected conduct outside the scope of the federally funded program," the *Rust* Court found that the case was unlike *League of Women Voters*, which had foreclosed all avenues for the protected expression, and upheld the regulations. *Id.* at 197, 111 S. Ct. 1759.[30]

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[30] In *Rust*, the Court offered further elaboration on its reasoning in *Regan*, stating: [I]n *Regan* we held that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. In so holding, we explained that such organizations remained free "to receive deductible contributions to support . . . nonlobbying activit[ies]." 461 U.S. at 545, 103 S. Ct. 1997. Thus, a charitable organization could create, under § 501(c)(3) of the Internal Revenue Code of 1954, 26 U.S.C. § 501(c)(3), an affiliate to conduct its non-

Taken together, these decisions suggest that when Congress burdens the First Amendment rights of recipients of government benefits by placing restrictions on the eligibility for or use of such benefits, it must leave the recipients with adequate freedom to engage in protected expression through unregulated means. *See Velazquez I*, 164 F.3d at 766 (concluding that the inference these three cases yield is "that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels of protected expression"). Further, in each of these three rulings, there is some support for the application of heightened scrutiny when speech activities carried out with non-federal funds are restricted as a qualification for the receipt of federal funding. In *Rust*, the Court found that the challenged regulations, restricting the use of *federal funds* only, were "narrowly tailored to fit Congress's intent [that the funds] not be used to promote or advocate for abortion." *Rust*, 500 U.S. at 195 n. 4, 111 S. Ct. 1759.[31] *League of Women Voters* also ap

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lobbying activities using taxdeductible contributions, and at the same time establish, under § 501(c)(4), a separate affiliate to pursue its lobbying efforts without such contributions. 461 U.S. at 544, 103 S. Ct. 1997. *Given that alternative*, the Court concluded that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity[; it] has simply chosen not to pay for [appellee's] lobbying." *Id.* at 546, 103 S. Ct. 1997 (emphasis added). *Rust*, 500 U.S. at 197-198, 111 S. Ct. 1759. This explanation of *Regan* further underscores the importance of according to recipients of a conditioned government benefit sufficient ability to engage in protected speech supported with their private funds.

[31] It is notable that in *Rust* the Court articulated a narrow tailoring test even where Congress's restrictions on speech applied only to the use of federal, and not private, funds. In addition, in the same footnote,

plied heightened scrutiny in rejecting the Government's argument that the restriction on all editorial expression was justifiable as an exercise of Congress's power pursuant to the Spending Clause. *See* 468 U.S. at 399-400, 104 S. Ct. 3106. The *League of Women Voters* Court distinguished *Regan* precisely because *Regan* allowed for an adequate alternate channel of communication. Indeed, it is significant that while *Regan* upheld the challenged tax code provision under a rational relationship standard, the restriction (no lobbying) applied only to activities paid for with government subsidized funds (those collected as tax deductible contributions). The *Regan* court found that a requirement that lobbying activities be conducted with unsubsidized contributions, through an affiliate § 501(c)(4) organization, was not "unduly burdensome." *Regan*, 461 U.S. at 544 n. 6, 103 S. Ct. 1997.

Finally, the rulings in these cases provide support to the approach of the analysis suggested above that looks to the effect of the government funding restriction on the power relationship between the state and the people that the First Amendment serves to preserve appropriately balanced. Applying the Policy Requirement to the recipients' privately funded speech activities unduly burdens organizations that may have qualms over endorsing the government's viewpoint or encounter other risks to their private use of such funds. At the same

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the Court goes on to cite *Dole* for the proposition that "Congress's power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use." *Id.* This statement suggests that heightened scrutiny is appropriate even where funding is allocated by Congress pursuant to its spending powers as discussed in *Dole*, contrary to the Government's arguments.

time, the condition would favor organizations that conceptually supported the government's position, have no private funds to put in jeopardy or otherwise do not have the financial or programmatic strength to resist the government's inducement.

The Government, in its bid for the Court to apply a rational relationship test pursuant to a Spending Clause analysis, endeavors to distinguish these cases, asserting as well that the Supreme Court's ruling in *American Library Association* supports Defendants' claim for the application of a rational basis standard. In addition, the Government argues that because the Act involves the arena of international relations, Congress's choices are entitled to the more deferential standard of review. For the reasons stated below, the Court finds these arguments unpersuasive.

(a) *The Government Cannot Adequately Distinguish Regan, League of Women Voters, and Rust*

i. *Alternate Channels for First Amendment Activities*

There is no doubt that Congress has broad powers to determine how federal funding should be utilized. However, as *League of Women Voters* demonstrates, and *Rust* further underscores, any attempt by Congress to foreclose a grant recipient's ability to engage in certain protected conduct with its private funds should be greeted warily. *See League of Women Voters,* 468 U.S. at 400-01, 104 S. Ct. 3106; *Rust,* 500 U.S. at 196, 111 S. Ct. 1759. While the Government correctly argues that the Supreme Court did not face the question of restrictions on private spending in either *Rust* or *Regan,* and thus these decisions are not binding as to the issue at

hand, this contention does little to diffuse the support for Plaintiffs' arguments that emerges from the compelling rationale and language of these two decisions. Given that *League of Women Voters* is the only Supreme Court decision to directly address a statute in which a private organization's private spending was entirely restricted as a condition of obtaining government funding (and that the Court found such a restriction unconstitutional), the Supreme Court's reliance in both *Rust* and *Regan* on the availability of alternate channels for grant recipients' First Amendment activity as a basis for upholding the challenged provisions in each of those cases is strongly persuasive here.

ii. *The Role of NGOs*

The Government's effort to distinguish *League of Women Voters* as a unique case because the core First Amendment activity of expression of editorial opinion was implicated is also unavailing. To be sure, *League of Women Voters* did note that the expression of editorial opinion "lies at the heart" of First Amendment protection. 468 U.S. at 381, 104 S. Ct. 3106; *see also id.* at 376, 104 S. Ct. 3106 (editorial opinion entitled to "most exacting" degree of First Amendment protection). However, the instant case presents an infringement on Plaintiffs' First Amendment rights to communicate openly about matters of public concern, a right that has historically been recognized, no less so than editorial opinion, as "rest[ing] on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 993, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982). While the Court recognizes the immense degree of protection that journalistic expression is granted under the First Amendment, it is unpersuaded that the

expression at stake here is of such a materially different character as to render the analysis in *League of Women Voters,* and that decision's application of heightened scrutiny, inapplicable in this case.

Indeed, the far-reaching role of NGOs in presenting issues of concern to governmental officials, as well as contributing to public debate on contested social issues, in influencing the course of public policy as well as in enhancing core public values and safeguarding them from government abuse, has always been critical to our democracy. From the beginning of the Republic to this day, as Congress itself recognized in the Act, 32 NGOs have played a significant role as partners of government in administering vital public services. They promote fuller participation and a diversity of views in civil society. They have served as advocates of public causes, as voices for the marginalized, disenfranchised and impoverished, and as counterweight to the more powerful interests in our society, both as friends and as adversaries of the government. They engage in conducting public forums to disseminate information, opinions and advice on issues before the government, a function that is critical to an informed citizenry. Quite simply, public interest groups have resources and capabilities that individuals, acting alone, do not: "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control/ Coalition for Fair Housing v. Berkeley,* 454 U.S. 290, 294, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981).

By means of these and many other functions NGOs perform, they help fundamentally in shaping the nation's public agenda. For that reason their ability to engage an "uninhibited, robust, and wide-open" public discourse

serves as an essential weight in preserving the balanced power relationship between the government and the people that the First Amendment safeguards. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The diversity and breadth of the traditional public functions NGOs contribute to our society should rank the quality of First Amendment rights and protection they merit to no lesser degree than that accorded to editorial opinion or to universities. *See, e.g., Rust*, 500 U.S. at 200, 111 S. Ct. 1759 (noting that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment") (*citing Keyishian v. Board of Regents*, 385 U.S. 589, 603, 605-06, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967)); *Claiborne Hardware Co.*, 458 U.S. at 907, 102 S. Ct. 3409 ("the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.") (*quoting Citizens Against Rent Control*, 454 U.S. at 294, 102 S. Ct. 434.)

The organizations implicated in the present case serve precisely these values. OSI, AOSI, Pathfinder, and several amici seek to cooperate with the Government in furtherance of a shared purpose: combating the devastating consequences of the HIV/AIDS pandemic. They seek to do so, however, without forfeiting the critical role they play in stimulating public discourse on controversial issues, including eminently debatable questions such as what may be the most appropriate or effec-

tive policy to engage high-risk groups in such efforts. The Policy Requirement, to the extent it prevents NGOs from speaking openly on such questions with their private funds, contravenes our national commitment open debate and our First Amendment values. *See New York Times Co.*, 376 U.S. at 270, 84 S. Ct. 710.

(b) *American Library Association Is Not Controlling*

The Government argues that the Supreme Court's ruling in *American Library Association* supports a finding that statutes enacted pursuant to the Spending Clause may impose conditions limiting grant recipients' exercise of their First Amendment rights even with private funds. In that case, the Supreme Court upheld a provision of the Children's Internet Protection Act ("CIPA") requiring libraries receiving federal funding for their internet service costs to enforce a "policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access." 47 U.S.C. § 254(h)(6)(c). *See also* 539 U.S. at 201, 123 S. Ct. 2297. The Government points to the case as an instance in which the Supreme Court applied a rational relationship test to restrictions that had application beyond the government funds themselves, and upheld the restrictions because they were sufficiently related to the objectives of the statute.

The Government's reliance on *American Library Association* is misplaced. Significantly, in the various opinions upholding the challenged act, the Supreme Court carefully took note that CIPA's requirement that Internet filtering software be applied to all funding re-

cipients' computers imposed a comparatively minimal burden on the First Amendment rights implicated in that case. The plurality opinion first observed that libraries possess the "traditional role in identifying suitable and worthwhile material [and they] are no less entitled to play that role when [they] collect materials from the Internet than when [they] collect material from any other source." *Id.* at 208, 123 S. Ct. 2297. The Court noted that most libraries exclude pornography from their print collection, and that libraries have the same ability to block access to pornographic websites. In answer to the dissent's concerns about constitutional rights that would be impinged by the unintended "over blocking" of access to speech, the plurality found that any constitutional concerns "are dispelled by the ease with which patrons may have the filtering software disabled," noting that libraries had the ability to permanently unblock erroneously blocked sites and to remove the filter to a specific site at the request of a patron. *Id.* at 209, 123 S. Ct. 2297. In his concurring opinion,[33] Justice Kennedy agreed with the upholding of the statute because there had not been any showing that adult library users' First Amendment right to access protected material would be burdened "in any significant degree," as sites could be unblocked upon request. *Id.* at 214, 123 S. Ct. 2297; *see also id.* at 220, 123 S. Ct. 2297 (Breyer, J. concurring) ("Given the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is

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[33] Justice Kennedy's opinion, as the narrowest majority view, is considered the controlling opinion. *See Velazquez III*, 349 F. Supp. 2d at 593-594 (*citing* standard set out in *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977)).

disproportionate when considered in relation to the Act's legitimate objectives.")[34]

Viewing *American Library Association* as evaluating a restriction that imposed a minimal burden on First Amendment rights, as it could be undone upon request, the inapplicability of the decision to the circumstances presented by the instant case becomes clear. Here, Defendants' application of the Policy Requirement to Plaintiffs is substantially more burdensome, as it requires Plaintiffs to agree to not engage, even with their private funds, in undefined forms of speech that at any moment and on any indeterminate subject the Government could interpret as being inconsistent with a "policy opposing prostitution," a limitation that Plaintiffs have demonstrated directly impinges on their First Amendment rights and substantially impairs their ability to express these ideas. This broad restriction, encumbering Plain-

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[34] In addition, the Court notes that public libraries, as government entities, hold a somewhat different position vis-a-vis the First Amendment than do NGOs. Indeed, there is a significant question as to whether a government entity may invoke the protections of the First Amendment at all. *See American Library Ass'n*, 539 U.S. at 210-11, 123 S. Ct. 2297. In *American Library Association*, the Supreme Court, while not relying on this distinction between private citizens and public entities, recognized the issue and questioned, without deciding, whether a public library could even advance a claim under the unconstitutional conditions doctrine. *See id.* at 210-12, 123 S. Ct. 2297 (finding that the filtering requirement did not impose an unconstitutional condition, "assuming . . . that public libraries have First Amendment rights"); *see also id.* (acknowledging the argument that public entities do not have First Amendment rights) (*citing Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n. 7, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973)) (Stewart, J. concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the government.").

tiffs' ability to engage in public debate on particular topics, is not comparable to the minimal burden associated with the easily lifted filter applied to library computers at issue in *American Library Association.* Indeed, the ability of library patrons to request that the filter be lifted as needed is somewhat analogous to the ability of the organizations in *Regan* and *Rust* to continue their privately financed activities with non-government funds or subsidies. Despite the need for a library patron to request on occasion that a site be unblocked, the *American Library Association* Court found that this imposition did not impose an unduly burdensome restriction on their First Amendment interests. Thus, the *American Library Association* decision, which applied the rational basis test as the appropriate standard of review, may be best explained not by the breadth of Congress's Spending Clause power but by the insubstantial degree to which the challenged provision burdened the complainants' First Amendment rights.[35]

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[35] While the Court finds that this rationale provides the most consistent analysis of these cases, it pauses to take note of a potential ambiguity arising in the *American Library Association* decision. In his dissenting opinion, Justice Stevens argues that the CIPA provision in question is an unconstitutional condition. In support of this contention, Justice Stevens points out that the provision requires that once a library has received any benefit through the specified federal programs, it must implement the filtering device on all of its computers, whether or not the computers were purchased with federal funds or were connected to the Internet through the federally funded discount Internet access programs. Thus, if a "library attempts to provide Internet service for even *one* computer through an E-rate discount, that library must put filtering software on *all* of its computers with Internet access, not just the one computer with E-rate discount." *Id.* at 230, 123 S. Ct. 2297 (Stevens, J. dissenting) (emphasis in original). In response to this point, the plurality opinion states that "CIPA does not 'penalize' libraries that choose not to install such software . . . rather, CIPA simply

(c) *The Act's Effect on International Affairs Is Not Cause for the Automatic Application of a Rational Basis Standard of Review*

The Court is also unpersuaded that the government's interest in clearly communicating its goals in the field of international relations provides a basis for applying rational basis review in the instant case. The Court recognizes that "when the government speaks in international affairs, it speaks not only with its words and its funds

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reflects Congress's decision not to subsidize their doing so." *Id.* at 212, 123 S. Ct. 2297. The plurality goes on to state: "To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance." *Id.* Upon review, the meaning of this sentence is somewhat ambiguous, as the text itself can be read to suggest either that libraries may impose the filtering device only on those computers receiving the federally discounted Internet service, while continuing to act freely with its own funds, *or* that libraries are not mandated to adhere to the filtering requirement, as they remain free to turn down federal assistance and thus continue to offer unrestricted Internet access to their patrons should they so choose. While the context of the overall opinion suggests that the sentence should be read in the latter manner, some confusion remains. If Justice Stevens is correct that the Act requires filters on computers that are connected to the Internet through means other than the federal discount programs, then the plurality's statement that "CIPA simply reflects Congress's decision not to subsidize [unfiltered Internet access]" would seem to be incorrect. That is, a provision requiring that all library computers be installed with filtering software, regardless of whether or not the computer is connected to the Internet through a means subsidized by the federal government, would extend the restriction beyond the access subsidized by Congress. In any case, even assuming that the sentence should be read to state that the Act permissibly imposes restriction on computers accessing the Internet thorough non-federally funded means, the Court would not find such language decisive. As discussed above, *American Library Association* is a plurality decision, and it is Justice Kennedy's concurring opinion, relying on the minimal burden imposed by the filtering device, that is controlling.

but also with its associations." *DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 290-91 (D.C. Cir. 1989). At oral argument, the Government suggested that the Act's impact on international relations provided a basis for distinguishing this case from *Rust*, *League of Women Voters* and *Regan*, all of which indicate that Congress must leave open adequate alternative channels for communication of ideas when imposing speech related conditions on Government benefits. The Government suggested that because here, unlike in the preceding cases, the Act has ramifications for United States foreign policy efforts abroad, the Act's limitations on speech, even if such restrictions substantially impair the recipients' ability to express certain viewpoints, should be subject to only rational basis review. The Court cannot agree.

While mindful of the government's strong interest in managing the country's international relations, the Court cannot find that this interest, in this case, is sufficient to warrant the rational basis deference that the Government requests.[36] First, the Act itself does not

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[36] At the outset, the Court notes that there is a distinction between a non-justiciable foreign policy objective, and the justiciable implementation of such an objective by an agency. In this case, at this stage in the litigation, it is the agency implementation of the Act's provision that is at issue, and the enjoinment of such an interpretation pending an outcome on the merits is scope of the relief that the Court considers in this opinion. *See Planned Parenthood Fed'n of America, Inc. v. Agency for Int'l Dev.*, 915 F.2d 59, 62 (1990) (discussing procedural history in case involving agency implementation of executive branch policy, stating: "In [our previous decision] we agreed that the policy itself was not justiciable, but we reversed and directed the district court to consider on remand the legality of [the agency's] implementation of the [policy].").

suggest that the nation's foreign policy interests are the primary governmental ends driving this legislation, or that these interests require uniform policies on the part of all entities receiving funds through the Act. As is discussed at length in Section IV.A.2.b.i, below, the Act exempts from the Policy Requirement certain organizations which have in the past recognized that advocacy for the reduction of criminal penalties for prostitution are among the best practices in HIV prevention, suggesting that the Government's foreign policy interests are not undermined by association with organizations that hold such views. Finally, the Government's reliance on *DKT*, for its deference to the executive branch in the arena of foreign policy, is misplaced insofar as that case involved a challenge to a restriction on the First Amendment activities of *foreign* NGOs accepting United States government funds. *See DKT Memorial Fund*, 887 F.2d 275.

The policy challenged in that case required foreign NGOs accepting United States government grants to forego all abortion related activities, even with their private funds, but allowed domestic NGOs receiving government grants to continue to spend their private funds as they chose. To the extent that the *DKT* court did not focus on the policy's distinction between foreign and domestic NGOs in upholding the restriction, as the Government contends they did not, any suggestion in *DKT* that such a restriction would be valid if applied to domestic NGOs is dictum.[37] In addition, the Second Cir

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[37] Notably, in the section of the *DKT* opinion discussing the government's interest in selectively spending funds abroad, the arguments are limited to activities carried out with government funds. For example, the Circuit Court notes that "to hold that the government cannot make

cuit, in addressing a parallel challenge to the policy in question in *DKT*, upheld the restriction on foreign NGOs while explicitly noting that the policy did not "prohibit plaintiffs [domestic NGOs] from exercising their First Amendment rights . . . [The domestic NGOs] may use their own funds to pursue whatever abortion related activities they wish in foreign countries." *Planned Parenthood Fed'n*, 915 F.2d at 64. In the instant case, as Plaintiffs have pointed out, the restrictions at issue apply to NGOs based in the United States, restrictions which extend to these NGOs' speech within United States (for example, a conference on sexual rights and sexual health that AOSI will co-sponsor in this country in June of 2006). Defendants simply have not made an adequate showing as to why such domestic, private speech activity should be necessarily classified as a matter of American foreign policy. Taking all of these factors into consideration, the Court concludes that while the Government's increased interest in preventing its message from being distorted in the domain

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viewpoint based choices in foreign aid and foreign affairs . . . would work much mischief." 887 F.2d at 290. The Circuit Court's examples of such mischief, however, speak to burdens that could improperly be placed on *government* funds—including the argument that such a rule would expose the government's funding of an anti-apartheid initiative to unconstitutionality if the government refused to provide funding to encourage the continuance of apartheid. The opinion's relevance is also considerably narrowed because the case deals with restrictions on funding of *foreign* NGOs and speaks to the United States government's choice of foreign partners, an issue more closely related to foreign affairs than the funding of domestic organizations for their work abroad which is at issue here. *See id.* at 53 ("We observe again, that a nation speaks in foreign affairs not only by the express messages that it sends, but by its choice of *foreign entities* with whom it will associate.") (emphasis added).

of international relations abundantly demonstrates the validity of the Act's speech restriction on activities conducted with government funds, it is not sufficient to negate Plaintiffs' First Amendment rights when they act with private funds.

iv. *Statement of Standard of Review*

In light of the preceding Supreme Court precedents, which this Court finds sufficiently compelling, the Court rejects the Government's argument that rational relationship review is applicable to this case and concludes that a heightened standard of review is appropriate.[38] In applying this heightened scrutiny, the Court asks whether the restriction, as interpreted and applied by Defendants, is "narrowly tailored to fit Congress's intent." *Rust*, 500 U.S. at 195 n.4, 111 S. Ct. 1759; *see also League of Women Voters*, 468 U.S. at 395, 104 S. Ct. 3106 (noting that while the government had a "substantial interest" in the legislation's purpose, the interest could be "fully satisfied by less restrictive means that are readily available" and striking down the provision); *c.f. Velazquez I*, 164 F.3d at 766—67 (noting that while the record before the court was insufficient for facial invalidation of regulations, the rules may be subject to an as applied challenge if they "prove [to be] unduly burdensome and inadequately justified, with the result that [the Act and regulations] will suppress impermissibly the speech of certain funded organizations and their lawyers"); *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 945 (9th Cir. 1983) (finding that ban restricting organizations receiving state funds from en-

[38] The Court views strict scrutiny as inapplicable to the instant case as the Policy Requirement is not a direct regulation on speech, but rather affects First Amendment freedoms indirectly.

gaging in abortion related activities was not narrowly tailored).

As the variance between the standards applied by the Supreme Court in *League of Women Voters* and *Rust* indicates, there is no settled articulation of the heightened standard of review in this area of law. Thus, this Court adopts *Rust'* s phrasing of the heightened standard, applying a traditional First Amendment narrow tailoring test to the challenged provision. The Court concludes that, of the relevant precedents considered, *Rust* speaks most directly to the issues of the instant case, largely because both cases involve speech regulated by Spending Clause enactments through which the government conveys a message and endeavors to compel compliance with that message by placing conditions on eligibility for government benefits.[39] Furthermore, the narrow tailoring test has been applied in analogous situations in which a regulation or statute touches on competing constitutional interests, or where there is some government justification for speech-related harm—for example, in both the commercial speech context and also in the analysis of time, place, and manner restrictions. *See, e.g., Board of Trustees, v. Fox,* 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) (in a case involving commercial speech, requiring "a fit between the legislature's ends and the means chosen to

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[39] This aspect of both *Rust* and the instant case, insofar as they concern government spending designed to carry out a government initiative rather than to foster a variety of speech, is discussed at length in Section IV. A.2.b.ii, *infra.* For now, the Court merely notes that in *League of Women Voters,* the government was fostering speech by providing funds to broadcasters, and perhaps for this reason the slightly higher level of scrutiny articulated in that case, suggesting a least restrictive means analysis, was warranted.

accomplish those ends . . . a means narrowly tailored to achieve the desired objective"); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) (upholding a National Park Service regulation challenged by protest planners as an appropriate time, place, manner regulation where it was content neutral, narrowly tailored to serve a significant government interest, and left open ample alternative channels for communication of the information).

b. *Application of Standard and Additional First Amendment Analysis*

i. *As Construed by Defendants, the Provision Is Not Narrowly Tailored to Achieve Congress's Goals*

Defendants assert that the Policy Requirement is needed to further Congress's intended aims, all deriving from the Government's goal of fighting HIV/AIDS and Congress's chosen policy of eradicating prostitution as part of its methodology to achieve this goal. In particular, the Government argues that it has an interest in not having its message (that the eradication of prostitution is part of its strategy to combat HIV/AIDS) distorted by the activities of its private partners in this fight.[40] Plaintiffs take issue with this asserted concern and the degree of the Government's interest in furthering this goal. They argue that the Government's purported interest has not been sufficiently supported with a factual

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[40] The Government's asserted interest in avoiding the perceptions of a mixed message on the part of the United States government is analyzed in detail in Section IV.A.2.b.ii, *infra*.

record.[41] Plaintiffs also contend that the primary purpose of the Act is to combat the spread of HIV/AIDS and other diseases, while the goal of the "eradication of prostitution" as a means of stemming the harms associated with prostitution is just one of twenty-eight congressional findings in the Act which together call for the prevention and treatment of HIV/AIDS. *See* 22 U.S.C. § 7601, (1)-(22), (24)-(28). Plaintiffs argue that to the extent the asserted overall goal, the fight against HIV/AIDS, is at cross purposes with the secondary goal of the eradication of prostitution, the Government has a limited interest in that secondary goal.[42]

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[41] Plaintiffs cite *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), and *League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278, in support of two related arguments. They allege that (1) "Congress made no findings and heard no testimony regarding the undermining of its anti-prostitution message by funding recipients" and (2) Defendants have not shown "that the government's anti-prostitution message lost currency during the year and a half during which they refrained from applying the pledge requirement to U.S. organizations." (Pl. Reply at 14.) Each argument may be seen as a derivation of the more general proposition that the Government must present "more than anecdote and supposition" about the supposed harms regulated speech will cause when imposing a content-based restriction on speech. *Playboy Entm't Group*, 529 U.S. at 822, 120 S. Ct. 1878. The Court is not convinced that this point bears the same force here, as neither case involved speech regulated by Spending Clause enactments through which the government conveys a message. Since the Court finds that the exclusion provision of the Act belies the Government's assertion that the means it has chosen is narrowly tailored to achieve its interest, the Court need not further address this issue at this point.

[42] As was discussed in Section IV.A.1.b, Plaintiffs' argument that the eradication of prostitution is really only a secondary goal of the Act, is in part an attempt to do an end-run around the Act's finding that the eradication of prostitution should be the policy of the United States as it pursues the aims of the Act. In Plaintiffs' view, the goal of eradicat-

The Court declines to dwell on this debate, however, as the Government's claim that its goals will be jeopardized if the Policy Requirement is not enforced as the Government interprets it is undercut by the Act's exclusion provisions exempting certain recipients of funds under the Act from complying with § 7631(f). The text of that provision states that "this subsection shall not apply to the Global Fund to Fight Aids, Tuberculosis and Malaria, the World Health Organization ["WHO"], the International AIDS Vaccine Initiative or to any United Nations agency." 22 U.S.C. § 7631(f). As Plaintiffs point out, both the WHO and the Joint United Nations Programme on HIV/AIDS ("UNAIDS") and possibly other United Nations agencies have recognized advocacy for the reduction or removal of penalties imposed on prostitution, so that such penalties do not interfere with outreach efforts by driving this population underground, as among the best practices in HIV prevention. (Beyrer Decl. ¶ 25.) Each of these organizations receives funds pursuant to the Act. The Government has not advanced any explanation as to why a restriction on Plaintiffs' speech is necessary to protect Congress's goals in promoting uniformity of message while these high profile organizations can engage in clearly dissenting speech. The Government's purported fear of its

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ing prostitution can undermine efforts to fight HIV/AIDS because prostitutes must be empowered and enlisted in this fight, which may require actions that are at odds with a goal of immediate eradication of prostitution. Plaintiffs' argument is at base a restatement of the policy differences between Plaintiffs, who wish to preserve the right to engage in outreach to prostitutes, which can include providing supportive services to prostitutes, and the Government, which views the eradication of prostitution as one of the priorities in the fight against HIV/AIDS. As stated above, it is not the Court's role in adjudicating the instant dispute to resolve which of the parties has the better of this policy debate.

message being garbled by organizations that accept the Agencies' funds while simultaneously using their own funds to "[endorse], either implicitly or explicitly, the very practices that the program aims to eliminate" (*see* Def. Mem. at 37), is not sufficient to warrant the blanket ban on Plaintiffs' privately funded speech when the exempted organizations are free under the Act to make just such endorsements should they see fit. The exemption thus reinforces Plaintiffs' argument that the ban, as construed by Defendants, is more than is needed to protect the Government's asserted interest, and thus is not narrowly tailored.

Further, even assuming that the Government had presented significant interests in enforcing the Policy Requirement as currently construed, the Court still could not find that this construction is "narrowly tailored to fit Congress's intent." *Rust*, 500 U.S. at 195 n.4, 111 S. Ct. 1759. The current construction of the provision, requiring the Government's private partners to abstain from all speech that could be understood by the Government as supporting the decriminalization of prostitution, at this point, even absent formally adopted administrative agency definitions and regulations, amounts to a blanket ban on certain constitutionally protected speech. As such, Defendants' application of the provision is not "narrowly tailored." *See Loper v. New York City Police Dep't*, 999 F.2d 699, 705 (2d Cir. 1993) (holding that "a statute that totally prohibits begging in all public places cannot be considered 'narrowly tailored' to" achieve the prevention of the effects associated with begging); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126-27, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989) (concluding that a "total ban" on indecent in-

terstate commercial telephone messages was not narrowly tailored to protect children from exposure to indecent dial-a-porn messages); *Playboy Entm't*, 529 U.S. at 814, 120 S. Ct. 1878 ("[T]he objective of shielding children [from sexually-oriented material] does not suffice to support a blanket ban [on the transmission of such material] if the protection can be accomplished by a less restrictive alternative.").

The Court also notes the existence of other less restrictive methods of protecting the Government interests, which undermine the argument that the Act is narrowly tailored. Specifically, the Government could ensure clarity about the policies of the United States government in this area by requiring, as was the case of the regulatory scheme that the Supreme Court acknowledged as a saving grace in Rust and Regan, that government fund recipients sufficiently segregate and account for their government financed activities from those privately conducted. *See also, Velazquez I*, 164 F.3d at 766-67. Plaintiffs could also be required to issue disclaimers clarifying that particular projects and activities are privately funded and are not supported by any funds from the United States Government, a method far less restrictive than preventing Plaintiffs from engaging in any speech conveying a different viewpoint than the one advanced by the Act.[43] *See League of Women Voters*, 468 U.S. at 395, 104 S. Ct. 3106 (recognizing the Government's interest in ensuring that audiences of noncommercial stations would not be led to think that the sta-

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[43] Such disclaimers, stating in USAID agency funded publications that the views in the publication are not necessarily those of USAID, are currently required for USAID publications. *See, e.g.*, 22 C.F.R. § 226.91(c)(1).

tion's editorials reflected the view of the government, but noting that this interest could be "fully satisfied by less restrictive means that are readily available," including "simply requir[ing] public broadcasting stations to broadcast a disclaimer every time they editorialize"). These disclaimers could also be included on Plaintiffs' websites, delineating which projects are supported with the help of the Government, as well as in any written materials related to privately funded projects. The burden of providing disclaimers would be inordinately less restrictive than an indefinite ban on certain types of speech.

Even short of requiring disclaimers, the Court agrees with Plaintiffs that the Government has failed to demonstrate why the restriction on government funds is not itself adequate to prevent public confusion over its message, or why permitting grantees to refrain entirely from taking a position on prostitution would undermine the Government's message. *Cf. Reno v. American Civil Liberties Union*, 521 U.S. 844, 879, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (stating that the breadth of the challenged restriction imposed a burden on the government to explain "why a less restrictive provision would not be as effective" and finding the challenged statute not narrowly tailored "[p]articularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of [the challenged act]").

ii. *The Policy Requirement, as Construed by Defendants, Is Unconstitutional Because it Improperly Applies Its Viewpoint Discriminatory Restriction to Plaintiffs' Private Funds*

Plaintiffs additionally argue that the Policy Requirement is unconstitutional because it compels fund recipients to adopt the Government's viewpoint, and refrain from espousing any competing viewpoint even with their private funds, as a condition of receiving government funds. Defendants contend that when government legislation is aimed at the transmission of a government message, as opposed to creating a forum for increased speech from private speakers with varied viewpoints, the government may endorse one viewpoint over another, and choose to subsidize the transmittal of that particular message.

The Supreme Court has recognized that "even in the provision of subsidies, the government may not 'ai[m] at the suppression of dangerous ideas.'" *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (*quoting Regan*, 461 U.S. at 550, 103 S. Ct. 1997) (internal quotation marks omitted). In *Finley*, the Supreme Court upheld a statute requiring the National Endowment for the Arts ("NEA") to consider, as part of the criteria for evaluating grant applications, general standards of "decency and respect" for the diverse beliefs and values of the American public. *Id.* In doing so, the Court observed that the NEA's mandate was to make "aesthetic judgments" and thus it must implement an inherently content based "excellence" threshold. *Id.* at 586, 118 S. Ct. 2168. The Court noted that the case presented less of a constitutional dilemma because no facts were presented

suggesting that the NEA had denied a grant as a result of "invidious viewpoint discrimination." *Id.* at 587, 118 S. Ct. 2168. The Court went on to state that the case would be different "if the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints." *Id.* Plaintiffs argue that the Policy Requirement is precisely the sort of viewpoint based mandate that *Finley* distinguished from the provision upheld in that decision.

The Government rightly points to *Rust* and *Velazquez II* as supporting its argument that because here Congress is dispersing funds pursuant to a selective spending provision in which the government itself seeks to convey a message, it may choose to endorse one viewpoint over another. *See Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043 ("We have said that viewpoint based funding decisions can be sustained . . . in . . . instances, like *Rust*, in which the government used private speakers to transmit information pertaining to its own program."); *Rust*, 500 U.S. at 193, 111 S. Ct. 1759.[44] But in *Rust*, Congress's choice to fund one viewpoint over

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[44] While the Supreme Court has thus upheld provisions that embody viewpoint based funding decisions, it bears noting that the invalidated tax provision in question in *Speiser* can arguably be viewed as a this type of restriction. *See Speiser*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460. There, veterans were required to adopt an oath that they would not advocate for the overthrow of the Government by force or violence or other unlawful means, or advocate for support of a foreign government in the event of hostilities, in order to participate in California's property tax exemption program for veterans. *Id.* at 515, 78 S. Ct. 1332. Despite that the provision was designed to ensure that the veterans endorsed the government's message, and thus reflected a "viewpoint based funding decision[ ]," *Rust*, 500 U.S. at 193, 111 S. Ct. 1759, aimed at using private speakers to convey a government message, the Court struck down the oath requirement. *Id.* at 513, 78 S. Ct. 1332.

another extended only to the use of *federal* funds. And although *Velazquez II* expounds upon the government's ability to selectively fund certain viewpoints and not others, the Court there struck down a funding restriction which prevented *federal* funds from being used to bring suits questioning the validity of existing welfare laws. The Court in *Velazquez II* distinguished *Rust* in order to strike down a restrictive funding provision. Thus, even accepting the Government's reading of *Velazquez II* and *Rust* and the proposition that the subsidies in this case are aimed at conveying a government message as opposed to fostering speech, the fact remains that neither *Rust* nor *Velazquez II* speaks to the issue before this Court: whether the government may condition the grant of its funds on a requirement that recipients adopt its message and refrain from engaging in any activities that might be deemed supportive of any competing viewpoint even with its *private* funds.

Indeed, the *Rust* Court stated that Congress can "selectively fund a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust*, 500 U.S. at 193, 111 S. Ct. 1759. Here, however, Plaintiffs do not seek funding for the dissemination of viewpoints contrary to the Government's own program. They do not contest, as the plaintiffs did in *Rust*, the viewpoint-based restrictions imposed on activities conducted with government funds. Rather, they seek only to use their private funds to consider and pursue "alternative program[s] which [seek] to deal with the problem in another way." *Id.* This distinction is of paramount importance.

Defendants claim that the unprecedented degree of government restriction on competing viewpoints imposed by the Policy Requirement is warranted because of the broad scope of the government message that the Act conveys. The Government argues that because the Act sets forth a congressional policy of "eradicating prostitution, the sex trade, rape, sexual assault, and sexual exploitation of women and children," 22 U.S.C. § 7611(a)(4), the Policy Requirement is necessary to ensure that the government aim, and its message, are not undermined by the privately funded activities of Plaintiffs. The Government points out that "when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043 (internal quotation omitted).

The Government's argument would, upon first review, appear to be answered by *Rust*, the very precedent which it advances in support of its position, as there the Court upheld a viewpoint discriminatory funding requirement in part because the regulations implementing the funding restriction allowed for adequate alternative channels of communication, which the Policy Requirement, as currently construed, does not. But the Government argues that the instant case is distinguishable from *Rust* in that here the government's asserted policy aim—the eradication of prostitution—is broader than the goal advanced by the funding program in *Rust*.

In *Rust*, the Title X family planning program at issue was limited to pre-conception care, with abortion falling outside the scope of the federally funded program, and thus allowing Title X grant recipients to continue to of-

fer abortion related services with their private funds was not inconsistent with the government program's goals. The Government contends that this is in stark contrast to the program at issue here, where the government has articulated the eradication of prostitution as one of its strategies to fight HIV/AIDS. *See* 22 U.S.C. § 7611(a)(4). Thus, the Government's argument goes, to allow grant recipients to advocate, even with their private funds, for decriminalization, unionization or tolerance of prostitution is inconsistent with the program goals of the Act to a greater extent than was the case in *Rust*.[45]

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[45] The Court finds it noteworthy that the Government's asserted interest in eradicating prostitution may not be entirely inconsistent, or at least not as inconsistent as Defendants suggests, with Plaintiffs' aims of reaching out to and empowering prostitutes in the fight against HIV/AIDS. In the supporting documents and exhibits submitted to the Court, there is mention of at least one program that, though involving the engagement of the prostitution community, ultimately had the effect of reducing prostitution overall in the region in which the program operated. The Sonagachi Project in Calcutta, India not only helped produce low rates of HIV infection among prostitutes, but also contributed to a decrease in prostitution as economic and social barriers to exiting the sex industry were eased. (See Beyrer Decl. ¶ 42.) While the Sonagachi Project did not, at least insofar as this Court is aware, go as far as to advocate for the legalization of prostitution, it did provide prostitutes with a number of supportive services (e.g., adult literacy programs, loan assistance, group training sessions, and informal daily meetings in the "red light" districts), activities sufficiently supportive of prostitution to engender the criticism of Representative Mark Souder and twenty-eight other Members of Congress in a letter to USAID, characterizing the project as "pro-prostitution." (Letter from U.S. Representative Mark Souder et. al., to Andrew Natsios, Administrator of USAID, dated July 15, 2005, attached to Diller Decl. as Exhibit 10.) The Court highlights this example to point out that, to the extent the Government advances its interest in the eradication of prostitution as a justification for its interpretation of the Policy Require-

While the Government's argument is commendably creative, the Court cannot credit it as justifying the Policy Requirement's restriction on private funds. The plain fact is that in *Rust*, the regulations the Supreme Court upheld were designed to address precisely the same kind of mixed message concern that the Government complains of here. In *Rust*, the Secretary of Health and Human Services defended the "program integrity" regulations, which provided for the separation of the government funded Title X project from privately funded projects engaged in *by the same organization* involving abortion related services, as necessary to assure that "grantees avoid creating the appearance that the Government is supporting abortion related activities." *See Rust*, 500 U.S. at 188, 111 S. Ct. 1759 (noting that "the program integrity regulations were promulgated in direct response to the observations in the GAO and OIG reports that because the distinction between the recipients' Title X and other activities may not be easily recognized, the public can get the impression that Federal funds are being improperly used for abortion activities") (internal quotation and citation omitted). The regulation was thus specifically promulgated to address the potential for the same mixed message concern that is proffered by the Government here. While the Supreme Court found this concern sufficient to restrict the grant recipients' speech with regard to their federal funds, it explicitly relied on the existence of adequate channels of alternate communication for the grant recipients in doing so. *See id.* at 196-97, 111 S. Ct. 1759. The

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ment, it is arguable, as Plaintiffs note, that activities supportive of prostitutes themselves, and conceivably facilitating prostitution in the short term, may indeed in the long run serve Congress's goal of eradication of prostitution.

Government's effort to extend *Rust* to allow for viewpoint based speech restrictions on grant recipients' private funds on the basis of concerns about a mixed message goes beyond what has been permitted in any of the Supreme Court unconstitutional conditions cases addressing this issue.[46] *See id.* at 173, 111 S. Ct. 1759; *League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278; *Regan*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129.

Even if the Court found this argument persuasive, it would still decline to allow the government to impose the viewpoint based restriction at issue in this case, as the

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[46] The rationale proposed by the Government is problematic because it has no inherent limits and presumably could be manipulated to allow for almost any viewpoint based restriction—simply through the crafting of a sufficiently broad "government message." As was recognized in *Velazquez II*, "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." 531 U.S. at 547, 121 S. Ct. 1043. Furthermore, the Court does not agree with the notion that government contractors running potentially competing government and non-government programs necessarily detracts from the government's interests or messages. Indeed, this is not uncommon among those who work for and with the government. For example, pursuant to the President's charitable initiative for faith-based organizations, such organizations may use federal funds to provide services and assistance to those in need, but "organizations that engage in inherently religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance," though the organizations remain free to engage in these activities and types of speech when acting without federal assistance. *See* Presidential Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002). A second example arises with defense contractors, who routinely provide services to the United States Armed Services while at the same time working for potentially competing nations.

Government's arguments are deeply undercut by the Act's provisions excepting certain organizations from the Policy Requirement. As these carve out provisions, and the way in which they undermine the government's asserted interests, have already been discussed in Section IV.A.2.b.i, the Court will not detail again this point here. It is sufficient to say that the government's purported interest in the sanctity of its message cannot bear the weight of banning Plaintiffs' privately funded speech when specifically exempted organizations, without any justification offered, are free to maintain and express any policy they wish, or no policy at all, while accepting funds under the Act.

iii. *The Act Unconstitutionally Compels Speech*

Furthermore, the Government's viewpoint based restriction is even more offensive to the First Amendment as it improperly compels speech by affirmatively requiring Plaintiffs to adopt a policy espousing the government's preferred message. The Government defends this component of the requirement by again pointing to Congress's power pursuant to the Spending Clause, arguing that Plaintiffs cannot claim to be compelled as they are free to turn down the funds. The Government's response is another variation on its contention, relied on throughout its papers, that because the Act's restrictions on First Amendment freedoms reach Plaintiffs only if they choose to accept federal funds, such restrictions may be as broad and far-reaching as the government desires. This somewhat cavalier take-it-or-leave-it answer to an infringement of speech—which can more or less be characterized as "if you don't like it, lump it"—is simply not in keeping with the expectations our society derives from First Amendment freedoms and how gov-

ernment would respond to their invocation. The Supreme Court has repeatedly found that speech, or an agreement not to speak, cannot be compelled or coerced as a condition of participation in a government program. Whether the government is acting as an employer, a contractor, a patron, or in offering tax exemptions or public services, the principle remains the same: the government's ability to condition participation in its programs by the beneficiaries' relinquishment of constitutional protections is far from limitless. *See, e.g., Perry*, 408 U.S. at 597, 92 S. Ct. 2694 (state, acting as employer, cannot condition teaching position upon refraining from public or private criticism of college administration's policies); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 725-26, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996) (while the government, as contractor, may terminate at-will relationships without cause, "it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views"); *Speiser*, 357 U.S. at 518, 78 S. Ct. 1332 (rejecting the argument that because tax exemptions may be characterized as "privileges," they cannot constitute infringements of free speech); *see also Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (finding unconstitutional a requirement that drivers use license plate bearing state motto in order to use roadways); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (state could not compel schoolchildren to participate in flag salute and pledge as a condition of receiving access to public education).

The Government argues that these cases are inapposite as none of them involve a selective spending pro-

gram in which Congress "simply designed a limited program to expend government funds for a particular purpose." (*See* Def. Mem. at 35.) Admittedly, the compelled speech cases discussed do not concern Spending Clause enactments. Nonetheless, that the Policy Requirement at issue here arises out of a Spending Clause enactment, and thus is not a direct regulation of speech, is not enough to distinguish it from the overriding principle that emerges from these cases: that the government cannot compel speech in exchange for participation in a government program, even a program to which there is no direct entitlement. *Cf. FAIR*, 126 S. Ct. at 1308 (in upholding the Solomon Amendment's requirement that universities provide military recruiters equal access to campus as a condition of receiving government funding, the Court found that the funding provision compelled conduct as opposed to speech, while noting that "there is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse"). While it is also true that Plaintiffs can turn down the funds and avoid the compelled speech, this option is not sufficient to cure the heavy burden imposed by the Policy Requirement, especially because the provision extends to Plaintiffs' entire organizations.[47] The requirement essentially enlists the government's private partners to convey the government's message and renders these organizations, on this particular issue, de facto mouthpieces for its view. *Cf. Wooley*, 430 U.S. at 715-17,

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[47] In addition, Plaintiffs have asserted that they face strict penalties if they are found to violate the Policy Requirement, as the Defendant agencies retain the ability to unilaterally terminate their contracts, permanently disqualify them from receiving future funding, or even seek a refund of money already disbursed. (*See* Pl. Mem. at 22 n.21; Pl. Reply at 19 n. 12.)

97 S. Ct. 1428 (striking down a state provision that effectively forces an individual "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable" and noting that "where the state's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message"). The outcome for which the Government advocates would result in a potentially troublesome government funding arena, one in which the government would have the unmitigated ability to wield its spending power to play favorites, as described above, by supporting and thereby strengthening only those NGOs, entities, and individuals that convey messages supportive of the government's viewpoint, while placing at a disadvantage, and potentially weakening, those that decline to endorse the government's message. Insofar as the government engages in this form of viewpoint favoritism among significant players in the public debate of vital issues, whether by coercion or by inducements available only to those who would agree with the government's line, the practice would tend to offset the delicate balance of the power relationship between the government and the public that the First Amendment works to calibrate.

3. *AOSI and Pathfinder Have Demonstrated a Likelihood of Success on Their Constitutional Claims*

Because the provision as construed by Defendants cannot survive heightened scrutiny, and also impermissibly discriminates based on viewpoint and compels speech, it violates the First Amendment. Though Plaintiffs have also asserted, as an additional basis for enjoin-

ing Defendants from enforcing the Policy Requirement, that the provision is unconstitutionally vague,[48] the Court will not reach this argument at it has already determined that an injunction is warranted for the reasons already discussed.

4. *OSI Has Not Demonstrated a Likelihood of Success With Regard to Its Claim for Relief*

In seeking a declaratory judgment that the Policy Requirement cannot be applied to include OSI's activities, Plaintiffs express two related, but distinct, concerns. First, Plaintiffs have expressed a fear that USAID may attempt to impose the Policy Requirement directly upon OSI. This concern is easily dispensed with, as Defendants concede that OSI is not subject to

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[48] Plaintiffs claim that the policy requirement is impermissibly vague in three ways: it is unclear as to (1) the required content of a policy statement; (2) which privately funded activities will be construed as inconsistent with an opposition to prostitution; and (3) whether OSI's activities will be imputed to AOSI for purposes of ascertaining compliance.

The principal point of contention between the parties is the appropriate standard for assessing vagueness challenges in circumstances such as these. Plaintiffs argue that the relevant inquiry is whether the policy requirement fails to provide (1) a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" and (2) "explicit standards for those who apply [it]." (Pl. Reply at 18 (*citing Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)).) Plaintiffs contend that this rigorous standard is applicable to cases in which a government benefit is conditioned upon a restriction on speech. Defendants disagree, maintaining that when Congress enacts pursuant to its Spending Clause power, the Constitution tolerates a greater degree of vagueness. In addition, Defendants suggest that, even if the Plaintiffs' heightened standard is used, Defendants have provided sufficient guidance in the form of AAPDs, grant provisions, and informal correspondence and meetings.

the Policy Requirement because it is not a recipient of funding under the Act, either as a grantee or sub-grantee. (*See* Def. Mem. at 26 & 44 n.29.) In no uncertain terms, Defendants state that "the Act plainly provides that only funding recipients are subject to the conditions of the" Policy Requirement. (*Id.* at 44 n.29.) Moreover, this concession is consistent with USAID's current interpretation of the Act. (*See* USAID, AAPD 05-04, issued June 9, 2005, attached to Rosberger Decl. as Exhibit C and to Diller Decl. as Exhibit 3 (limiting certification of compliance to grantees and sub-grantees).)

Second, Plaintiffs have alleged a concern that OSI's speech will be imputed to AOSI. Accordingly, OSI claims that, absent assurances, it must monitor its own speech for fear that AOSI will be penalized on the basis of OSI's expressive activities. In this regard, Plaintiffs suggest that Defendants' aforementioned concession takes care "to leave open the possibility that Defendants will penalize AOSI for OSI's actions." (Pl. Reply at 23.) Setting aside the sense that Plaintiffs read too much into Defendants' statement, the Court is convinced that rendering a declaratory judgment on this point would be premature, skating too close to Article III's prohibition on the issuance of advisory opinions.

The legal doctrines of standing and ripeness arise out of Article III and the requirement that federal courts adjudicate only actual cases or controversies. *See, e.g., Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) ("The basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudica-

tion, from entangling themselves in abstract disagreements over administrative policies[.]"); *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 79 F.3d 1298, 1305 (2d Cir. 1996) ("A dispute is ripe for adjudication when there is a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.") (citations and internal quotation marks omitted). Central to the ripeness requirement is that courts should not endeavor to resolve contingencies that may or may not occur as expected or may not happen at all. *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580-81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985). Although the Court may agree that bringing affiliates within the ambit of the Policy Requirement would raise serious constitutional questions, Defendants simply have not taken any concrete steps in this direction. The prospect that Defendants will scrutinize OSI's speech and activities and impute them to AOSI is speculative and may very well never take place. To issue a declaratory judgment on this issue would be premature, and if OSI continues to monitor its own speech in this fashion, it does so out of an overabundance of caution, and its self-enforced silence cannot properly be said to be caused by Defendants' actions. Accordingly, because Plaintiffs have presented insufficient facts on this point to suggest that judicial intervention is required at this juncture, the Court declines to issue a declaratory judgment on this question.

B. *IRREPARABLE HARM*

Second Circuit precedent recognizes that, in light of our commitment to free speech, "the loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury." *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (*quoting Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)); *see also Green Party v. New York State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004). Because the Policy Requirement, as interpreted by the Agencies, prohibits certain expressive activities and compels the Plaintiffs to speak in contravention of the First Amendment, Plaintiffs have satisfied this requirement for securing injunctive relief.

Plaintiffs have identified several specific examples of the irreparable harm they face by reason of their loss of First Amendment freedoms. In particular, Plaintiffs allege that AOSI is "chilled from fully planning and participating in a conference regarding sex work that it plans to co-sponsor in June of 2006." (Pl. Reply at 32; see also Suppl. Kushen Decl. ¶ 3 (stating that "AOSI continues to be severely constrained in the program activities we may undertake with our private funds . . . For example, AOSI plans to cosponsor a conference, slated for June 2006 . . . [at which] AOSI seeks to discuss further key policy issues . . . including the legal status of sex work . . . due to the pledge requirement, we are chilled from fully planning and participating in the conference").) Pathfinder has alleged that it cannot resume, with its private funding, its work with community organizations in Brazil that have sought legal reform of prostitution laws in that country in an effort to help prostitutes avoid exploitation and abuse. (Pellegrom Decl. ¶ 20.) One additional way in which Plaintiffs face irreparable harm by reason of the Policy Requirement is the potential effect that the requirement can have on Plaintiffs' private fund-raising activities. As is

discussed in Section IV.A.2.a.iii, certain of Plaintiffs privately donated grants are potentially at risk to the extent that those funds are subject to conditions placed by private sources conflicting with those imposed by the Policy Requirement. For example, AOSI and OSI have, "as their principles of governance, an adherence to the principles of an open society, including opposition to adopting any policy positions that would lead to the stigmatization of socially marginalized groups." (Compl. ¶ 36.) Plaintiffs allege that adopting a policy opposing prostitution violates this principle. (*Id.*) Given these circumstances, the Court finds that Plaintiffs have made the necessary showing of irreparable harm.

V. ORDER

For the reasons stated above, the Court concludes that absent a preliminary injunction, AOSI and Pathfinder will suffer irreparable harm from Defendants' enforcement of the Policy Requirement, which is likely to violate the First Amendment. Accordingly, it is hereby

ORDERED that the parties to submit to the Court, within fourteen days of the date of this Order, a proposed preliminary injunction conforming with the determinations in this Decision.

SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NO. 05 CIV. 8209

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL., DEFENDANTS

Filed: Aug. 8, 2008

DECISION AND ORDER

VICTOR MARRERO, District Judge.

Plaintiffs, Alliance for Open Society International, Inc. ("AOSI"), and Pathfinder International ("Pathfinder") (collectively, "Plaintiffs") brought suit against defendants the United States Agency for International Development and Andrew S. Natsios in his official capacity as its administrator (collectively, "USAID"), the United States Department of Health and Human Services and Michael O. Leavitt in his official capacity as its Secretary (collectively, "HHS"), and the United States Centers for Disease Control and Prevention and Julie Louise Gerbeding in her official capacity as its Director (collectively "CDC") (together with USAID, HHS, and

CDC "Defendants," or the "Agencies," or the "Government"), alleging that a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. §§ 7601 *et seq.*, violated their First Amendment Rights. The Court granted Plaintiffs' motion for a preliminary injunction on May 9, 2006 enjoining Defendants from penalizing Plaintiffs. *See AOSI v. USAID*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006) ("*AOSI I*").

Plaintiffs now move to add Global Health Council ("GHC") and InterAction (collectively, the "Associations") as plaintiffs to this action and to extend the preliminary injunction to the Associations.

I. *BACKGROUND*[1]

Additional background information pertinent to this action is discussed in *AOSI I*, familiarity with which is presumed.

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[1] The factual recitation below is drawn from Plaintiffs' Memorandum in Support of Motion of Plaintiffs for Leave to File a Second Amended Complaint and Motion by Global Health Council and InterAction for a Preliminary Injunction, dated Feb. 8, 2008 ("Pls.' Mem."); Government's Memorandum in Opposition to Plaintiffs' Motion to File a Second Amended Complaint and for a Preliminary Injunction, dated March 17, 2008 ("Defs.' Opp."); and Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Leave to File a Second Amended Complaint and Motion by Global Health Council and InterAction for a Preliminary Injunction, dated Apr. 7, 2008 ("Pls.' Reply"). Except as specifically quoted or otherwise cited, no further reference to these documents will be made.

A. *PROCEDURAL HISTORY*

In *AOSI I*, Plaintiffs challenged § 7631(f) of the Leadership Act, which provides:

> No funds made available to carry out this Act, or any amendment made to this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

22 U.S.C. § 7631(f) ("§ 7631(f)" or the "Policy Requirement"). The Court granted Plaintiffs' motion for a preliminary injunction, and held that the Policy Requirement, as interpreted by the Government, violated Plaintiffs' First Amendment rights by requiring the Government's private partners in the implementation of the Leadership Act to abstain from all speech, including privately-funded speech, that could be understood by the Government to be contrary to the Policy Requirement. *See AOSI I* at 268-70. The Court stated that a heightened standard of review was appropriate "when a spending enactment substantially impairs First Amendment protected activity conducted by private entities with private funds as a condition of receiving a government benefit," and held that the Policy Requirement was unconstitutional because it was not "narrowly tailored to fit Congress's intent." *Id.* at 267-68.

Following the granting of the Court's preliminary injunction in *AOSI I*, Defendants indicated that they would continue to enforce the Policy Requirement against similarly-situated grantees who were not parties

to this case. Plaintiffs attempted to add additional parties to this action to obtain protection from enforcement of the Policy Requirement, but the Government did not consent to extending the terms of the preliminary injunction and amending the complaint. The Government then appealed this Court's decision to the Second Circuit, and the case was placed on this Court's suspense docket pending the outcome of the appeal.

On July 23, 2007, while the Government's appeal was pending before the Second Circuit, both HHS and USAID issued "organizational integrity" guidance. *See* HHS Guidance, 72 Fed. Reg. 41,076 (July 23, 2007); USAID AAPD 05-04 Amend. 1 (July 23, 2007) (collectively, the "Guidelines"). On November 8, 2007, the Second Circuit issued a summary order remanding the case to this Court to determine whether the preliminary injunction should be granted in light of the issuance of the Guidelines. *See AOSI v. USAID*, 254 Fed. Appx. 843 (2d Cir. 2007). The Circuit Court did not offer an opinion on the merits of the claims or on the constitutionality of the guidelines or the statute, and stated that, on remand, this Court could "consider any legal arguments it deems relevant and take any additional evidence that may be appropriate." *Id.* at 846. The Second Circuit also ordered that the injunction remain in place pending the proceeding before this Court.

At a conference held on November 30, 2007, Plaintiffs informed the Court of their desire to amend the complaint to add the Associations as Plaintiffs, and to extend the preliminary injunction to the Associations. Defendants advised the Court that they would not consent to either motion, leading to the dispute now before the Court.

B. *THE GUIDELINES*

Under the Guidelines promulgated by the Agencies, the Government no longer interprets the Leadership Act to require a blanket ban on all restricted activities by recipients of Leadership Act funds, but rather, the Guidelines permit recipients to partner with affiliate organizations which may "express views on prostitution and sex trafficking contrary to the government's message," as long as there is "adequate separation" between the recipient and the affiliated organization such that the affiliations "do not threaten the integrity of the Government's programs and its message opposing prostitution and sex trafficking." Guidelines at 41,076. The Guidelines provide that:

> [C]ontractors, grantees and recipients of cooperative agreements ("Recipients") [under the Leadership Act] must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with a policy opposing prostitution and sex trafficking ("restricted activities").

Id. The Guidelines state that a Recipient will be found to have objective integrity and independence from such an affiliated organization if:

(1) The affiliated organization is a legally separate entity;

(2) The affiliated organization receives no transfer of Leadership Act funds and Leadership Act funds do not subsidize restricted activities; and

(3) The Recipient is physically and financially separate from the affiliated organization. Mere

> bookkeeping separation of Leadership Act funds from other funds is not sufficient.

Id. The Guidelines elaborate that the agencies will "determine, on a case-by-case basis and based on the totality of the fact, whether sufficient physical and financial separation exists." *Id.* The Guidelines also set forth several non-exclusive factors to be used in that determination, but that the "presence or absence of any one or more factors will not be determinative." *Id.* The factors include:

> (i) The existence of separate personnel, management, and governance;
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> (ii) The existence of separate accounts, accounting records, and timekeeping records;
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> (iii) The degree of separation from facilities, equipment, and supplies used by the affiliated organization to conduct restricted activities, and the extent of such restricted activities by the affiliate;
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> (iv) The extent to which signs and other forms of identification which distinguish the Recipient from the affiliated organization are present, and signs and materials that could be associated with the affiliated organization or restricted activities are absent; and
>
> (v) The extent to which [the agency], the U.S. Government and the project name are protected from public association with the affiliated organization and its restricted activities in materials such as publications, conferences and press or public statements.

Id. at 41,077.

C. *THE ASSOCIATIONS*

InterAction is the largest alliance of United States-based international development and humanitarian non-governmental organizations ("NGOs"). InterAction members collectively receive more than $1 billion from the United States Government annually, including Leadership Act funding from Defendants, and more than $7 billion from private sources. Plaintiffs represent that twenty members of InterAction, fourteen of which wish to remain anonymous, have informed InterAction that they are both subject to the Policy Requirement and desire relief from it.

GHC is a private, nonprofit membership alliance consisting of member organizations dedicated to international public health, including many United States-based grantees that receive HIV/AIDS funding from the Government. According to Plaintiffs, twenty-eight GHC members, eighteen of which wish to remain anonymous, have told GHC that they are both subject to the Policy Requirement and desire relief from it.

II. *DISCUSSION*

Plaintiffs move to amend the complaint to add the Associations and to extend the preliminary injunction to the Associations. Plaintiffs contend that they can prove a likelihood of success on the merits because the Guidelines (1) unconstitutionally compel speech; (2) impose unconstitutional conditions on Plaintiffs' First Amendment rights; and (3) are unconstitutionally vague. Defendants argue that Plaintiffs' motion to amend the complaint should be denied, as the Associations lack standing, and therefore, such an amendment would be futile.

Additionally, Defendants argue that Guidelines as promulgated are constitutional under the standards enunciated by the Supreme Court and the Second Circuit. The Court will first address Defendants' standing argument, and will then address the likelihood of success for Plaintiffs' arguments regarding the constitutionality of the Guidelines.

A. *STANDING*

As a threshold matter, the Court must first determine whether the Associations have standing to bring this action, as amending the complaint would otherwise be futile. An amendment is futile if the court lacks jurisdiction over the amended pleading, or if it would otherwise be subject to a successful motion to dismiss. *See, e.g., S.S. Silberblatt, Inc. v. East Harlem Pilot Block,* 608 F.2d 28, 42 (2d Cir. 1979); *Freeman v. Marine Midland Bank—New York,* 494 F.2d 1334, 1338 (2d Cir. 1974); *Mitchell v. Keane,* 974 F. Supp. 332, 343-44 (S.D.N.Y. 1997).

"The doctrine of standing, which addresses the question of whether the plaintiff is entitled to have the courts decide the merits of the dispute or of particular issues, embraces both 'constitutional' and 'prudential' requirements." *Center for Reprod. Law and Policy v. Bush,* 304 F.3d 183, 195-96 (2d Cir. 2002) (*quoting Sullivan v. Syracuse Hous. Auth.,* 962 F.2d 1101, 1106 (2d Cir. 1992)). The "irreducible constitutional minimum" of standing contains three elements: (1) the plaintiff must have suffered an "injury-in-fact," meaning an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent, and not conjectural or hypothetical; (2) there must be a "causal connection" between the injury and the challenged conduct;

and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

An association attempting to bring suit on behalf of its members must satisfy the three-part test for associational standing by establishing that:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). The plaintiff has the burden of establishing the elements of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561, 112 S. Ct. 2130.

1. *Standing of Individual Members*

To satisfy the first prong of the *Hunt* test, at least one member of the association must satisfy the constitutional requirements of injury-in-fact, causation, and redressability. *See Building & Constr. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) ("An association bringing suit on behalf of its members must allege that one or more of its members has suffered a concrete and particularized injury. . . ."). Defendants argue that the injuries alleged by the Associations are merely hypothetical, and thus insufficient for standing, because none of the

Associations' members has attempted to form an affiliate to comply with the Guidelines.

The Associations allege that they have multiple members who meet the individual standing requirements, because: (1) they have adopted policies they otherwise would not have adopted, and (2) they do not know what speech is compelled, and what speech and activities are prohibited by the Policy Requirement and Guidelines. Both GHC and InterAction have conducted surveys of their members to determine the extent of the effect of the Policy Requirement on their membership. GHC states that it has 28 United States-based members which aver that they are subject to the Policy Requirement and would like relief from it; InterAction has 20 such members. For example, Cooperative for Assistance and Relief Everywhere, Inc. ("CARE"), which is a member of both GHC and InterAction, has purportedly adopted a policy opposing prostitution solely because of the Policy Requirement, and thus alleges that it is compelled to speak the Government's message and is prevented from communicating lessons from its HIV prevention work with prostitutes in India and Bangladesh because of the Policy Requirement. Furthermore, Pathfinder is also a member of GHC and InterAction, and its standing in the case has never been disputed. But for the preliminary injunction, Pathfinder alleges that it would have to refrain from sharing lessons from its privately-funded HIV prevention work with prostitutes. IntraHealth, a member of GHC, has stated that it wishes to remain silent on the social and political aspects of sex work, and therefore does not wish to speak to Government's viewpoint.

The Court is persuaded that the Associations have pled a sufficient injury-in-fact of at least one of their individual members. Bearing in mind that at the pleading stage mere allegations are sufficient to carry the plaintiff's burden of establishing the elements of standing, the Associations have adequately alleged both actual and imminent injuries. *See Lujan*, 504 U.S. at 561, 112 S. Ct. 2130. The Associations members are given the option of either foregoing Leadership Act funds, or attempting to comply with the legal separation requirement, which they contend is unconstitutional and would impose an extremely high financial cost for its members. *See American Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003) (finding standing where plaintiffs were presented with the choice of risking prosecution or of censoring the content of their websites). Additionally, Plaintiffs have met the threshold for establishing standing for a First Amendment claim by demonstrating "'an actual and well-founded fear that the law will be enforced against [them].'" *Id.* (*quoting Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000)). Furthermore, the fact that the Associations' members are required to speak the Government's message in exchange for the Leadership Act subsidy is a sufficient injury-in-fact for their compelled speech claim. Plaintiffs should not be forced to either forego their constitutional rights or risk legal action and the loss of their subsidies in order to have standing to challenge the Guidelines and the Policy Requirement.

Accordingly, the Court finds that the Associations have sufficiently demonstrated that at least one of their members would have individual standing to bring this case.

2. *Germaneness*

The second prong of the *Hunt* test of associational standing requires the plaintiff to establish that "the interests it seeks to protect are germane to the organization's purpose." 432 U.S. at 343, 97 S. Ct. 2434. "[T]he requirement of germaneness is undemanding; mere pertinence between litigation subject and organizational purpose is sufficient." *Building & Constr. Trades Council of Buffalo,* 448 F.3d at 148 (internal quotation marks omitted).

The Associations state that the purpose of their respective organizations is "to promote open debate on issues of public policy and to share among their members best practices in public health and humanitarian work." (Pl. Mem., at 17.) Defendants do not dispute that the purposes of the Associations are germane to the interests at stake in this litigation.

Accordingly, the Court finds that Plaintiffs have sufficiently alleged the germaneness requirement.

3. *Participation of Individual Members*

Under the third prong of the *Hunt* test, plaintiffs seeking associational standing must establish that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343, 97 S. Ct. 2434. This third prong is a prudential requirement left to the discretion of the court, not a constitutional requirement. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 555, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996). With regard to individual participation in the relief requested:

> whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

Warth v. Seldin, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

However, associational standing is not automatically granted whenever an association requests equitable relief, rather than damages. *See Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (noting that an "organization lacks standing to assert claims of injunctive relief on behalf of its members where the fact and extent of the injury that gives rise to the claims for injunctive relief would require individualized proof, or where the relief requested would require the participation of individual members in the lawsuit") (internal quotations and citations omitted).

Here, the Associations assert that there is no requirement for individualized proof for their claims that the Policy Requirement and its Guidelines are compelled speech, unconstitutionally vague, and do not provide an adequate alternative channel for their protected speech in light of the burdens on their members. They argue that no individualized determination is necessary because the Policy Requirement and Guidelines apply to all members and impose burdens common to them. For

example, all United States-based Leadership Act grantees must comply with the Policy Requirement, and the burdens of creating a legally and physically separate affiliate organization, registering the new legal entity with a foreign government, obtaining visas for staff and permission to open separate bank accounts, financing the affiliate, and staffing it with new personnel, equipment and supplies, would fall upon all members of the Association attempting to comply with the Guidelines.

The Associations assert that the applicable line of cases are those in which the determination of the claims depend on the Government's application of the law, and not on the facts concerning any individual grantee. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Supreme Court upheld the associational standing of an association of law schools to assert a claim that a military recruiting condition on federal funds violated the First Amendment rights of its members. *See* 547 U.S. 47, 52 n. 2, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). The district court found there was no need for individualized proof because the association's claim was "not that there is something unconstitutional about the manner in which the Government is applying the [statute and regulations] to a particular institution," but rather that the claim "is that the Government is applying a statute and its implementing regulations to almost every law school in the nation in a way that violates the law schools' First Amendment rights." *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 291 (D.N.J. 2003), *rev'd on other grounds*, 390 F.3d 219 (3d Cir. 2004), *rev'd on other grounds*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). The Associations also point to *National Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press*, where

this prong of the *Hunt* test was satisfied when half of the elements of the claims "can be proven largely by reference to the defendants' [conduct]. . . ." 990 F. Supp. 245, 249-50 (S.D.N.Y. 1997). The *College Bookstores* Court also found that while "[s]ome individuated proof may be required" it was "not nearly enough to require each [the association's members] to bring suit separately" and "[t]he fact that a limited amount of individuated proof may be necessary does not in itself preclude associational standing." *Id.* (*citing New York State Nat'l Org. of Women v. Terry*, 886 F.2d 1339, 1349 (2d Cir. 1989) (granting associational standing even though evidence from some individual members was required)).

Plaintiffs argue that as their compelled speech and unconstitutional conditions claims will be proven largely by reference to Defendants' actions, and that some individualized showing of the facts common to all members to support their claims is not fatal to associational standing. Further, they assert that no individualized proof is required to demonstrate that the Policy Requirement and Guidelines are unconstitutionally vague.

Defendants reply that the claims of the Associations cannot be adjudicated without the participation of individual members, *i.e.* that the "fact and extent" of the alleged injuries-in-fact of the individual members requires "individualized proof." *Warth*, 422 U.S. at 515-16, 95 S. Ct. 2197. They argue that an assessment of whether the Guidelines unduly burden the Associations' members' First Amendment rights or whether the Guidelines provide an adequate alternative channel for protected speech under the relevant case law, will depend upon an assessment of the impact of the Guidelines

on each individual member. The Defendants further contend that the Court cannot determine the degree to which a funding recipient is burdened without organization-specific evidence of what countries that organization operates in, whether the organization seeks to use private funding in that country to communicate in a manner inconsistent with an anti-prostitution policy, and the actual legal and practical requirements of operating an affiliate in that country.

Defendants, in turn, rely on those cases where associational standing has been denied because either the claims asserted or relief requested required individualized proof. *See, e.g., Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993) (finding that an association of landlords did not have standing to challenge city rent regulations on takings grounds, because establishing the takings claim would require a "factual inquiry for each landlord who alleges that he has suffered a taking [in order] to determine the landlord's particular return based on a host of individualized financial data"); *Bano*, 361 F.3d at 714-15 (finding that organizations representing individual landowners did not have standing to pursue claims for damages on behalf of their members for bodily harm and damage to real property resulting from groundwater contamination, which necessarily would require individualized proof); *Warth*, 422 U.S. at 515-16, 95 S. Ct. 2197 (holding that an organization of construction firms could not seek damages for the profits and business lost by its members because "whatever injury might have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof"). Thus, Defendants argue that because a central issue on remand is whether the burdens imposed by the Guide-

lines are unconstitutional, the claims asserted by the Associations require individualized proof as to each member's burdens, and so associational standing should be denied.

The Court finds that neither the claims asserted nor the relief requested by the Associations would require any significant participation of individual members in the lawsuit. As the Associations request injunctive and declaratory relief, the "relief requested" aspect of the third prong of the *Hunt* test is satisfied. *See Warth*, 422 U.S. at 515, 95 S. Ct. 2197. While Defendants' arguments are not without some merit, ultimately they do not speak to the vagueness claims or compelled speech claims asserted by the Associations.

The compelled speech and vagueness claims do not require individualized proof, as it is the conduct of Defendants in the form of the Policy Requirement and the Guidelines that will be the primary subject of inquiry. The Policy Requirement and the Guidelines apply to all Leadership Act grantees which are members of the Associations. While some individualized showing of facts common to all members to support the factual development of the Associations' compelled speech and vagueness claims will be necessary, this test does not preclude granting associational standing. *See College Bookstores*, 990 F. Supp. at 249-50; *New York State Nat'l Org. of Women*, 886 F.2d at 1349. To enjoin an unconstitutional practice, the Associations do not have to show redundant evidence of each separate impact of the Policy Requirement and Guidelines on every one of their members. *See Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 291; *cf. American Booksellers Ass'n, Inc. v. Houghton Mifflin Co., Inc.*, No. 94 Civ. 8566, 1995 WL

92270, at *5 (S.D.N.Y. Mar. 3, 1995) (holding that it was not necessary for the association to show impact on each and every member because "[a]t some point, the proof [provided by individual members] will become redundant").

As for the Associations' claims that the Policy Requirement and its Guidelines do not provide an adequate alternative channel for their protected speech in light of the alleged burdens on their members, these claims will undoubtedly require a more thorough factual development to establish the extent of the burden on the Associations' members. However, given the enumeration in the Guidelines of the factors to be considered in determining whether legal and physical separation of the parent organization and its affiliate exists, all the Associations' members will share the common burden of complying with the Guidelines. Thus, requiring an individualized showing of the efforts of every member of the Associations to comply with the Guidelines will necessarily involve duplicative and redundant proof. While the Court does not doubt that the precise actions and expenditures taken to comply with the Guidelines will vary from organization to organization, at issue in this case is whether the baseline burden enumerated in the Guidelines imposes unconstitutional conditions upon the protected speech of Plaintiffs. Given that the third prong of the *Hunt* test is a prudential consideration, that individualized evidence would be duplicative and redundant counsels in favor of granting associational standing in the interests of judicial economy. *See Hunt*, 432 U.S. at 343-44, 97 S. Ct. 2434 (granting such standing where the evidence included an individualized showing of the varying injuries by association members); *see also College Bookstores*, 990 F. Supp. at 249-50. In eval-

uating a challenge by an association of Washington apple growers to a North Carolina statute which required apple containers sold in North Carolina to be either unmarked or contain only the applicable U.S.D.A. grades on the outside, the *Hunt* Court held that:

> The prerequisites to "associational standing" described in *Warth* are clearly present here. The Commission's complaint alleged, and the District Court found as a fact, that the North Carolina statute had caused some Washington apple growers and dealers (a) to obliterate Washington State grades from the large volume of closed containers destined for the North Carolina market at a cost ranging from 5 to 15 cents per carton; (b) to abandon the use of preprinted containers, thus diminishing the efficiency of their marketing operations; *or* (c) to lose accounts in North Carolina. . . . [N]either the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context.

Hunt, 432 U.S. at 343-44, 97 S. Ct. 2434 (emphasis added). Thus, the varying extent of the burdens incurred by individual members of the Commission to comply with the North Carolina statute at issue did not preclude the granting of associational standing. *Id.* Authorities cited by Defendants do not suggest a different result, because takings claims, medical injuries, and damages to real property are prototypical examples of claims requiring individualized proof that do not speak to the vagueness claims or compelled speech claims of the Associations. *Cf. Forum for Academic & Institutional Rights*, 547 U.S. at 52 n. 2, 126 S. Ct. 1297 (recognizing associational standing in the context of a compelled speech claim).

Moreover, in cases involving a facial challenge to a statute on First Amendment grounds, the prudential limitations of associational standing are generally relaxed because of the important societal interests that are implicated. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); *Lerman v. Board of Elections in the City of New York*, 232 F.3d 135, 143-45 (2d Cir. 2000) (discussing that a facial challenge to a statute on First Amendment grounds is governed by the overbreadth doctrine where prudential standing concerns are relaxed); *New York City C.L.A.S.H. v. City of New York*, 315 F. Supp. 2d 461, 468-69 (S.D.N.Y. 2004) (relaxing the prudential standing requirements in the context of an organization's challenge to the New York City smoking ban on First Amendment grounds).

The preceding discussion demonstrates that the Associations have established that at least one member which satisfies the constitutional requirements of injury-in-fact, causation, and redressability, that the Associations' purposes are germane to the interests at stake in this dispute, that the claims asserted and the relief requested do not require the participation of individual members in the lawsuit beyond a limited showing of facts common to their members, and that the interests in judicial economy and protecting the right to free ex-

pression balance against the restriction of associational standing.

Accordingly, the Court finds that the Associations have sufficiently demonstrated that they have associational standing to bring this action.

B. *PRELIMINARY INJUNCTION*

For the Court to issue a preliminary injunction against the Government, Plaintiffs must demonstrate both a likelihood of success on the merits and a threat of irreparable harm. *See, e.g., Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 763 (2d Cir. 1999) ("*Velazquez I*").

1. *Compelled Speech*

In *AOSI I*, the Court held that the Policy Requirement impermissibly compelled speech. *See* 430 F. Supp. 2d at 274-76. The Court was not persuaded by Defendants' argument that the Policy Requirement did not compel speech because Plaintiffs were subject to the restrictions on their First Amendment rights only if they chose to accept Leadership Act funds. *Id.* at 274. The Court found that such a "take-it-or-leave-it answer to an infringement of speech . . . is simply not in keeping with the expectations our society derives from First Amendment freedoms. . . ." *Id.* The Court also disagreed with Defendants' view that Supreme Court doctrine on compelled speech was not applicable because those cases did not address Spending Clause enactments, and held:

> That the Policy Requirement at issue here arises out of a Spending Clause enactment, and thus is not a direct regulation of speech, is not enough to distinguish it from the overriding principle that emerges from [the Supreme Court line of] cases: that the gov-

> ernment cannot compel speech in exchange for participation in a government program, even a program to which there is no direct entitlement.

Id. at 275.

Plaintiffs argue that the Guidelines do not remedy this constitutional defect, and thus also unconstitutionally compel speech. The Court agrees. While the Guidelines may or may not provide an adequate alternate channel for Plaintiffs to express their views regarding prostitution, the clause requiring Plaintiffs to adopt the Government's view regarding the legalization of prostitution remains intact. Plaintiffs are still not permitted to abstain from taking a view with regard to prostitution, but rather, are required to espouse the Government's position. Because the Guidelines do not alter the compelled speech provision of the Policy Requirement, the Court finds, for the same reasons as stated in *AOSI I*, that the provision unconstitutionally compels speech. Therefore, Plaintiffs have demonstrated a likelihood of success to warrant the extension of the preliminary injunction ordered in *AOSI I*.

2. *Unconstitutional Conditions*

i. *Standard of Review*

In *AOSI I*, this Court used heightened scrutiny to hold that when the Government seeks to implement a viewpoint-based restriction that imposes burdens on the privately funded speech of grantees, it must show that the restriction is "narrowly tailored to fit Congress's intent." 430 F. Supp. 2d at 267. Defendants argue that under the Second Circuit's holding in *Brooklyn Legal Servs.*, 462 F.3d 219 (2d Cir. 2006) ("BLS"), the Court's use of heightened scrutiny was improper.

In *BLS*, the Second Circuit upheld the constitutionality of federal restrictions on local legal assistance programs that receive funding through the Legal Services Corporation ("LSC"). The restrictions applied regardless of whether the recipients received non-federal funds in addition to LSC funds, and prohibited recipients from, among other things, participating in class action suits, seeking attorneys' fees, and personally soliciting clients. Under the LSC regulations, recipients could engage in restricted activities through affiliate organizations provided the recipient maintained "objective integrity and independence" from the affiliate. *Id.* at 223. The Second Circuit held that "Congress may burden the First Amendment rights of recipients of government benefits *if the recipients are left with adequate alternative channels for protected expression.*" *Id.* at 231 (emphasis in original). The Second Circuit rejected the use of heightened scrutiny in stating that the interests of LSC and the federal government "cannot be subject to the least- or less-restrictive-means mode of analysis" as that was "more appropriate for assessing the government's direct regulation of a fundamental right" and not "when the government creates a federal spending program." *Id.* at 229 (*citing United States v. American Library Ass'n*, 539 U.S. 194, 211-12, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) and *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987)). The *BLS* Court stated that the district court had "fashioned an 'undue burden' test out of whole cloth from unrelated case law concerning abortion, commerce, and ballot access rights." *Id.*, at 232. Accordingly, Defendants argue that the use of heightened scrutiny in *AOSI I* was improper, and the appropriate standard is whether the

recipients are left with adequate alternative channels for protected expression under the Guidelines.

The Court disagrees with Defendants that *BLS* provides the appropriate standard by which to review Plaintiffs' unconstitutional conditions claim. The holding in *BLS* was premised on a finding that the statute at issue did not discriminate on the basis of viewpoint, and the Second Circuit indicated that the result would have been different had the statute done so. *See BLS*, 462 F.3d at 230 (stating that restrictions "directed toward speech" are on the "'highest rung' of First Amendment values" which may require "closer attention" (*quoting Velazquez v. LSC*, 164 F.3d 757, 771 (2d Cir. 1999) ("*Velazquez I*"), *aff'd on other grounds*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001)) (stating that the Supreme Court would not tolerate a regulation authorizing grants funding support for, but barring criticism of, a government policy)).

Furthermore, in *Velazquez I*, the Second Circuit invalidated a viewpoint-based restriction that prohibited recipients from using both federal and private funds to challenge welfare laws without referencing the "adequate alternative channels" analysis it used for those provisions it deemed viewpoint neutral. *See Velazquez I*, 164 F.3d at 770 (stating that "[w]hether a subsidy that is dependent on viewpoint constitutes illegal discrimination presents a complex question, which is illuminated by three recent Supreme Court holdings"). The Second Circuit held that the because the provision was viewpoint discriminatory, it was "subject to strict First Amendment scrutiny." *Id.* at 772. However, *Velazquez I* did not articulate the standard in any additional detail, as it simply noted that the defendants "offered no argu-

ments as to why the provision can survive such scrutiny and [the Second Circuit] perceive[d] none." *Id.*

In *AOSI I*, the Court found that the there was no settled articulation of the applicable heightened standard, and adopted the Supreme Court's articulation in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), which applied a traditional First Amendment narrow tailoring test to the challenged provision. "In applying this heightened scrutiny, the Court asks whether the restriction, as interpreted and applied by the Defendants is 'narrowly tailored to fit Congress's intent.'" *AOSI I*, 430 F. Supp. 2d at 267 (*quoting Rust*, 500 U.S. at 195 n.4, 111 S. Ct. 1759).

Accordingly, because the Court finds that the Second Circuit's decision in *BLS* did not change the applicable standard of review for Plaintiffs' unconstitutional conditions claim, the Court's reasoning and determination of the appropriate standard of review in *AOSI I* is still applicable in determining whether the preliminary injunction should be extended to the Associations, and the Court will apply such heightened scrutiny using the narrow tailoring test.

ii. *Application*

In *AOSI I*, the Court held that while the Government had a legitimate interest in not having its message "garbled" and in ensuring the uniformity of its message, such an interest was undercut by the exemption of certain high-profile organizations, which were permitted to engage in dissenting speech, and as such, the Government's interests were not sufficient to warrant a blanket ban on Plaintiffs' privately-funded speech. 430 F. Supp. 2d at 269. The issue now before the Court is whether

the Guidelines sufficiently cure this constitutional defect.

Plaintiffs argue that the Guidelines are unconstitutional for the same reasons as the Policy Requirement was found unconstitutional in *AOSI I*, specifically because: (1) the Policy Requirement still excludes certain funding recipients, and thus, the Government's interests remain undermined; (2) the Policy Requirement still imposes a blanket ban on speech by funding recipients because the Guidelines do not allow recipients to advance their privately-funded speech through an affiliate organization that they control through overlapping boards and management; and (3) the Policy Requirement continues to massively burden Plaintiffs' privately funded speech because of the Guidelines' extreme separation requirement without adequate justification. Plaintiffs further argue that the affiliate regimes that were upheld by the Supreme Court in two relevant cases did not mandate such extreme separation, but rather, allowed shared personnel, management, governance, and/or boards. *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544-46, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983); *Rust*, 500 U.S. at 180-81, 111 S. Ct. 1759. Finally, Plaintiffs argue that the Guidelines can be differentiated from the LSC regulations, which "allow control at the Board level, [so] recipients will have an avenue through which to engage in restricted activities." 62 Fed. Reg. 27,695, 27,697 (May 21, 1997).

Defendants respond that the Guidelines were modeled on the LSC restrictions, and thus, the case is squarely on point with *BLS* and *Velazquez I* (collectively, the "LSC Cases"), which upheld restrictions on

local legal assistance programs. Defendants also rely on the recent opinion of the D.C. Circuit upholding the Policy Requirement, while also acknowledging that such a holding is only persuasive authority. *See DKT Int'l, Inc. v. USAID*, 477 F.3d 758 (D.C. Cir. 2007).

The Court finds that there are significant differences between the instant case and the LSC Cases. First, as previously stated, this case is governed by heightened scrutiny, whereas the LSC cases were not, and thus were not subject to a narrow-tailoring analysis. Second, the Associations operate internationally in dozens of countries, many of them developing states still lacking administrative rules under which foreign entities may function effectively, which increases the burdens imposed by even identical regulations. Third, the LSC regulations allow for control at the board level, whereas the Guidelines contain no such provision. Additionally, while the D.C. Circuit upheld the Policy Requirement in *DKT*, it did so based on the Government's representations that recipients would be able to express their privately-funded views through a subsidiary that was not subject to the Policy Requirement. *See* 477 F.3d at 763 (stating that "nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies that it has a policy opposing prostitution"). The Guidelines had not yet been promulgated at the time of the *DKT* decision, and therefore, the D.C. Circuit was not aware of the restrictions placed on recipients, such that compliance with the Guidelines is not as straightforward as the simple organization of a subsidiary, which normally does not entail the separations imposed by the Guidelines.

In *AOSI I*, the Court concluded that "*Rust* speaks most directly to the issues of the instant case, largely because both cases involve speech regulated through Spending Clause enactments through which the government conveys a message and endeavors to compel compliance with that message by placing conditions on eligibility for government benefits." *AOSI I*, 430 F. Supp. 2d at 267-68. The *Rust* plaintiffs challenged the "program integrity" requirement of Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-6 ("Title X"), which provides federal funding for family planning services. The program integrity requirement mandates that Title X projects not provide counseling services concerning the use of abortion, prohibits Title X projects from engaging in activities that encourage, promote, or advocate abortion, and requires that Title X projects be physically and financially separate from prohibited abortion activities. *See Rust*, 500 U.S. at 179-80, 111 S. Ct. 1759. The *Rust* Court noted that the separation requirement "distinguishes between a Title X *grantee* and a Title X *project*," and that a grantee may continue to engage in abortion-related activities through programs that are separate and independent from projects that receive Title X funds. *Id.* at 196, 111 S. Ct. 1759 (emphasis in original). "To be deemed physically and financially separate, 'a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient.'" *Id.* at 180-81, 111 S. Ct. 1759 (*quoting* 42 C.F.R. § 59.9 (1989)). The regulations at issue in *Rust* enumerated various factors considered by the Government to determine the existence of adequate separation, including: (1) separate accounting records and separate personnel; (2) the degree of separation

from facilities (specifically, treatment, consultation, examination and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; and (3) the extent to which signs and other forms of identification of the Title X project are present, and signs and material promoting abortion are absent. *See* 42 C.F.R. § 59.9 (1989).

Because the Court has previously noted the similarities between the instant case and *Rust*, the Court will now also look to *Rust* in evaluating whether the Guidelines are narrowly tailored to effectuate Congress's intent. In *Rust*, the Government defended the separation requirements on the grounds that they were "necessary to assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Id.* at 188, 111 S. Ct. 1759. In this case, the Government's interest is exactly the same as that articulated in *Rust*, and yet, the burdens imposed on the First Amendment rights of recipients are significantly greater than those imposed by the regulation at issue in *Rust*. Notably absent from the regulations at issue in *Rust* is the separate management and governance requirement, which is prescribed in the Guidelines.

Given the symmetry of governmental interests in *Rust* and the instant case, the existence of a less-burdensome affiliate scheme in *Rust* supports the argument that the Guidelines are not sufficiently narrowly tailored, because a less-restrictive means is available to adequately protect the Government's interests. Additionally, the Court agrees with Plaintiffs that the Guidelines' separate management and governance require-

ment mandates that any Leadership Act recipient that wishes to express views contrary to the Government's mandated opposition to prostitution would be able to do so only through an affiliate over which it exercised no control. Finally, because a substantial number of significant organizations remain exempt from the Policy Requirement and Guidelines, the Government's interests in conveying a uniform message remain undermined, as noted in *AOSI I*. *See* 430 F. Supp. 2d at 269.

The Court finds that the Guidelines require more separation than is reasonably necessary to satisfy the Government's legitimate interest, embodied in the Policy Requirement, and that the Guidelines are not narrowly tailored to achieve Congress's goals. Because the Court finds that the Policy Requirement and the Guidelines would not survive heightened scrutiny, and also impermissibly compel speech, they violate the First Amendment. Accordingly, the Associations have demonstrated a likelihood of success on the merits.

3. *Vagueness*

The Court did not address Plaintiffs' vagueness claims in *AOSI I*, because it granted the preliminary injunction on the basis of their claims concerning compelled speech and unconstitutional conditions. The Court likewise does the same here, and will not reach this argument since it has already determined that an injunction is warranted for the reasons already discussed.

C. *RES JUDICATA*

Defendants argue that DKT International ("DKT"), as a member of GHC, is barred from seeking relief in this action because its application is prohibited by the

principles of res judicata.[2] Plaintiffs concede that the D.C. Circuit's ruling in *DKT*, 477 F.3d 758, on viewpoint discrimination and compelled speech bars DKT from seeking the protection of this preliminary injunction under the principle of res judicata. However, Plaintiffs argue that their vagueness and unconstitutional conditions challenges to the Policy Requirement, as modified by the Guidelines, were not before the *DKT* Court, and therefore, that if the Court issues a preliminary injunction based on those challenges, res judicata should not bar DKT from the protections of the preliminary injunction.

The Court finds that DKT is barred from benefitting from the preliminary injunction, as the Court's decision to extend the preliminary injunction is based on a finding that the Policy Requirement does discriminate on the basis of viewpoint and does compel speech.

III. *ORDER*

For the reasons stated above, it is hereby

ORDERED that the motion (Docket No. 66) of Plaintiffs Alliance for Open Society International ("AOSI") and Pathfinder International ("Pathfinder") for leave to file a Second Amended Complaint to add Global Health

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[2] Defendants also argue in their papers that GHC itself was barred by virtue of the participation of DKT as its privy. By letter dated, June 20, 2008, Defendants acknowledged that the Supreme Court disapproved the doctrine of "virtual representation" in its recent decision in *Taylor v. Sturgell*, — U.S. —, 128 S. Ct. 2161, 2167, 171 L. Ed. 2d 155 (2008). Therefore, Defendants concede that they could no longer demonstrate that non-party preclusion principles bar GHC from participating in this action. Accordingly, the Court will not address Defendants' res judicata argument with regard to GHC.

Council ("GHC") and InterAction as plaintiffs to this action is GRANTED; and it is further

ORDERED that the motion of GHC and InterAction for a preliminary injunction barring defendants the United States Agency for International Development and Andrew S. Natsios in his official capacity as its administrator, the United States Department of Health and Human Services and Michael O. Leavitt in his official capacity as its Secretary, and the United States Centers for Disease Control and Prevention and Julie Louise Gerbeding in her official capacity as its Director from enforcing the requirement § 7361(f) of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. §§ 7601 *et seq.*, is GRANTED, but that DKT International, as a member of GHC, shall be barred from benefitting from the preliminary injunction.

SO ORDERED.

APPENDIX E

1. 22 U.S.C. 7601 (2006 & Supp. IV 2010) provides:

Findings

Congress makes the following findings:

(1) During the last 20 years, HIV/AIDS has assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation.

(2) According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), more than 65,000,000 individuals worldwide have been infected with HIV since the epidemic began, more than 25,000,000 of these individuals have lost their lives to the disease, and more than 14,000,000 children have been orphaned by the disease. HIV/AIDS is the fourth-highest cause of death in the world.

(3)(A) At the end of 2002, an estimated 42,000,000 individuals were infected with HIV or living with AIDS, of which more than 75 percent live in Africa or the Caribbean. Of these individuals, more than 3,200,000 were children under the age of 15 and more than 19,200,000 were women.

(B) Women are four times more vulnerable to infection than are men and are becoming infected at increasingly high rates, in part because many societies do not provide poor women and young girls with the social, legal, and cultural protections against high risk activities that expose them to HIV/AIDS.

(C) Women and children who are refugees or are internally displaced persons are especially vulnerable to sexual exploitation and violence, thereby increasing the possibility of HIV infection.

(4) As the leading cause of death in sub-Saharan Africa, AIDS has killed more than 19,400,000 individuals (more than 3 times the number of AIDS deaths in the rest of the world) and will claim the lives of one-quarter of the population, mostly adults, in the next decade.

(5) An estimated 2,000,000 individuals in Latin America and the Caribbean and another 7,100,000 individuals in Asia and the Pacific region are infected with HIV or living with AIDS. Infection rates are rising alarmingly in Eastern Europe (especially in the Russian Federation), Central Asia, and China.

(6) HIV/AIDS threatens personal security by affecting the health, lifespan, and productive capacity of the individual and the social cohesion and economic well-being of the family.

(7) HIV/AIDS undermines the economic security of a country and individual businesses in that country by weakening the productivity and longevity of the labor force across a broad array of economic sectors and by reducing the potential for economic growth over the long term.

(8) HIV/AIDS destabilizes communities by striking at the most mobile and educated members of society, many of whom are responsible for security at the local level and governance at the national and subnational levels as well as many teachers, health care personnel, and other community workers vital to community development and the effort to combat HIV/AIDS. In some

countries the overwhelming challenges of the HIV/AIDS epidemic are accelerating the outward migration of critically important health care professionals.

(9) HIV/AIDS weakens the defenses of countries severely affected by the HIV/AIDS crisis through high infection rates among members of their military forces and voluntary peacekeeping personnel. According to UNAIDS, in sub-Saharan Africa, many military forces have infection rates as much as five times that of the civilian population.

(10) HIV/AIDS poses a serious security issue for the international community by—

(A) increasing the potential for political instability and economic devastation, particularly in those countries and regions most severely affected by the disease;

(B) decreasing the capacity to resolve conflicts through the introduction of peacekeeping forces because the environments into which these forces are introduced pose a high risk for the spread of HIV/AIDS; and

(C) increasing the vulnerability of local populations to HIV/AIDS in conflict zones from peacekeeping troops with HIV infection rates significantly higher than civilian populations.

(11) The devastation wrought by the HIV/AIDS pandemic is compounded by the prevalence of tuberculosis and malaria, particularly in developing countries where the poorest and most vulnerable members of society, including women, children, and those individuals living with HIV/AIDS, become infected. According to the World Health Organization (WHO), HIV/AIDS, tu-

berculosis, and malaria accounted for more than 5,700,000 deaths in 2001 and caused debilitating illnesses in millions more.

(12) Together, HIV/AIDS, tuberculosis, malaria and related diseases are undermining agricultural production throughout Africa. According to the United Nations Food and Agricultural Organization, 7,000,000 agricultural workers throughout 25 African countries have died from AIDS since 1985. Countries with poorly developed agricultural systems, which already face chronic food shortages, are the hardest hit, particularly in sub-Saharan Africa, where high HIV prevalence rates are compounding the risk of starvation for an estimated 14,400,000 people.

(13) Tuberculosis is the cause of death for one out of every three people with AIDS worldwide and is a highly communicable disease. HIV infection is the leading threat to tuberculosis control. Because HIV infection so severely weakens the immune system, individuals with HIV and latent tuberculosis infection have a 100 times greater risk of developing active tuberculosis diseases thereby increasing the risk of spreading tuberculosis to others. Tuberculosis, in turn, accelerates the onset of AIDS in individuals infected with HIV.

(14) Malaria, the most deadly of all tropical parasitic diseases, has been undergoing a dramatic resurgence in recent years due to increasing resistance of the malaria parasite to inexpensive and effective drugs. At the same time, increasing resistance of mosquitoes to standard insecticides makes control of transmission difficult to achieve. The World Health Organization estimates that between 300,000,000 and 500,000,000 new cases of malaria occur each year, and annual deaths

from the disease number between 2,000,000 and 3,000,000. Persons infected with HIV are particularly vulnerable to the malaria parasite. The spread of HIV infection contributes to the difficulties of controlling resurgence of the drug resistant malaria parasite.

(15) HIV/AIDS is first and foremost a health problem. Successful strategies to stem the spread of the HIV/AIDS pandemic will require clinical medical interventions, the strengthening of health care delivery systems and infrastructure, and determined national leadership and increased budgetary allocations for the health sector in countries affected by the epidemic as well as measures to address the social and behavioral causes of the problem and its impact on families, communities, and societal sectors.

(16) Basic interventions to prevent new HIV infections and to bring care and treatment to people living with AIDS, such as voluntary counseling and testing and mother-to-child transmission programs, are achieving meaningful results and are cost-effective. The challenge is to expand these interventions from a pilot program basis to a national basis in a coherent and sustainable manner.

(17) Appropriate treatment of individuals with HIV/AIDS can prolong the lives of such individuals, preserve their families, prevent children from becoming orphans, and increase productivity of such individuals by allowing them to lead active lives and reduce the need for costly hospitalization for treatment of opportunistic infections caused by HIV.

(18) Nongovernmental organizations, including faith-based organizations, with experience in health care and HIV/AIDS counseling, have proven effective in com-

bating the HIV/AIDS pandemic and can be a resource in assisting indigenous organizations in severely affected countries in their efforts to provide treatment and care for individuals infected with HIV/AIDS.

(19) Faith-based organizations are making an important contribution to HIV prevention and AIDS treatment programs around the world. Successful HIV prevention programs in Uganda, Jamaica, and elsewhere have included local churches and faith-based groups in efforts to promote behavior changes to prevent HIV, to reduce stigma associated with HIV infection, to treat those afflicted with the disease, and to care for orphans. The Catholic Church alone currently cares for one in four people being treated for AIDS worldwide. Faith-based organizations possess infrastructure, experience, and knowledge that will be needed to carry out these programs in the future and should be an integral part of United States efforts.

(20)(A) Uganda has experienced the most significant decline in HIV rates of any country in Africa, including a decrease among pregnant women from 20.6 percent in 1991 to 7.9 percent in 2000.

(B) Uganda made this remarkable turnaround because President Yoweri Museveni spoke out early, breaking long-standing cultural taboos, and changed widespread perceptions about the disease. His leadership stands as a model for ways political leaders in Africa and other developing countries can mobilize their nations, including civic organizations, professional associations, religious institutions, business and labor to combat HIV/AIDS.

(C) Uganda's successful AIDS treatment and prevention program is referred to as the ABC model: "Ab-

stain, Be faithful, use Condoms", in order of priority. Jamaica, Zambia, Ethiopia and Senegal have also successfully used the ABC model. Beginning in 1986, Uganda brought about a fundamental change in sexual behavior by developing a low-cost program with the message: "Stop having multiple partners. Be faithful. Teenagers, wait until you are married before you begin sex."

(D) By 1995, 95 percent of Ugandans were reporting either one or zero sexual partners in the past year, and the proportion of sexually active youth declined significantly from the late 1980s to the mid-1990s. The greatest percentage decline in HIV infections and the greatest degree of behavioral change occurred in those 15 to 19 years old. Uganda's success shows that behavior change, through the use of the ABC model, is a very successful way to prevent the spread of HIV.

(21) The magnitude and scope of the HIV/AIDS crisis demands a comprehensive, long-term, international response focused upon addressing the causes, reducing the spread, and ameliorating the consequences of the HIV/AIDS pandemic, including—

(A) prevention and education, care and treatment, basic and applied research, and training of health care workers, particularly at the community and provincial levels, and other community workers and leaders needed to cope with the range of consequences of the HIV/AIDS crisis;

(B) development of health care infrastructure and delivery systems through cooperative and coordinated public efforts and public and private partnerships;

(C) development and implementation of national and community-based multisector strategies that address the impact of HIV/AIDS on the individual, family, community, and nation and increase the participation of at-risk populations in programs designed to encourage behavioral and social change and reduce the stigma associated with HIV/AIDS; and

(D) coordination of efforts between international organizations such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the World Health Organization (WHO), national governments, and private sector organizations, including faith-based organizations.

(22) The United States has the capacity to lead and enhance the effectiveness of the international community's response by—

(A) providing substantial financial resources, technical expertise, and training, particularly of health care personnel and community workers and leaders;

(B) promoting vaccine and microbicide research and the development of new treatment protocols in the public and commercial pharmaceutical research sectors;

(C) making available pharmaceuticals and diagnostics for HIV/AIDS therapy;

(D) encouraging governments and faith-based and community-based organizations to adopt policies that treat HIV/AIDS as a multisectoral public health problem affecting not only health but other areas

such as agriculture, education, the economy, the family and society, and assisting them to develop and implement programs corresponding to these needs;

(E) promoting healthy lifestyles, including abstinence, delaying sexual debut, monogamy, marriage, faithfulness, use of condoms, and avoiding substance abuse; and

(F) encouraging active involvement of the private sector, including businesses, pharmaceutical and biotechnology companies, the medical and scientific communities, charitable foundations, private and voluntary organizations and nongovernmental organizations, faith-based organizations, community-based organizations, and other nonprofit entities.

(23) Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic. One in nine South Africans is living with AIDS, and sexual assault is rampant, at a victimization rate of one in three women. Meanwhile in Cambodia, as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia. Victims of coercive sexual encounters do not get to make choices about their sexual activities.

(24) Strong coordination must exist among the various agencies of the United States to ensure effective and efficient use of financial and technical resources within

the United States Government with respect to the provision of international HIV/AIDS assistance.

(25) In his address to Congress on January 28, 2003, the President announced the Administration's intention to embark on a five-year emergency plan for AIDS relief, to confront HIV/AIDS with the goals of preventing 7,000,000 new HIV/AIDS infections, treating at least 2,000,000 people with life-extending drugs, and providing humane care for millions of people suffering from HIV/AIDS, and for children orphaned by HIV/AIDS.

(26) In this address to Congress, the President stated the following: "Today, on the continent of Africa, nearly 30,000,000 people have the AIDS virus—including 3,000,000 children under the age of 15. There are whole countries in Africa where more than one-third of the adult population carries the infection. More than 4,000,000 require immediate drug treatment. Yet across that continent, only 50,000 AIDS victims—only 50,000—are receiving the medicine they need.".

(27) Furthermore, the President focused on care and treatment of HIV/AIDS in his address to Congress, stating the following: "Because the AIDS diagnosis is considered a death sentence, many do not seek treatment. Almost all who do are turned away. A doctor in rural South Africa describes his frustration. He says, 'We have no medicines. Many hospitals tell people, you've got AIDS, we can't help you. Go home and die.' In an age of miraculous medicines, no person should have to hear those words. AIDS can be prevented. Anti-retroviral drugs can extend life for many years * * * Ladies and gentlemen, seldom has history offered a greater opportunity to do so much for so many.".

(28) Finally, the President stated that "[w]e have confronted, and will continue to confront, HIV/AIDS in our own country", proposing now that the United States should lead the world in sparing innocent people from a plague of nature, and asking Congress "to commit $15,000,000,000 over the next five years, including nearly $10,000,000,000 in new money, to turn the tide against AIDS in the most afflicted nations of Africa and the Caribbean".

(29) On May 27, 2003, the President signed this chapter into law, launching the largest international public health program of its kind ever created.

(30) Between 2003 and 2008, the United States, through the President's Emergency Plan for AIDS Relief (PEPFAR) and in conjunction with other bilateral programs and the multilateral Global Fund has helped to—

(A) provide antiretroviral therapy for over 1,900,000 people;

(B) ensure that over 150,000 infants, most of whom would have likely been infected with HIV during pregnancy or childbirth, were not infected; and

(C) provide palliative care and HIV prevention assistance to millions of other people.

(31) While United States leadership in the battles against HIV/AIDS, tuberculosis, and malaria has had an enormous impact, these diseases continue to take a terrible toll on the human race.

(32) According to the 2007 AIDS Epidemic Update of the Joint United Nations Programme on HIV/AIDS (UNAIDS)—

(A) an estimated 2,100,000 people died of AIDS-related causes in 2007; and

(B) an estimated 2,500,000 people were newly infected with HIV during that year.

(33) According to the World Health Organization, malaria kills more than 1,000,000 people per year, 70 percent of whom are children under 5 years of age.

(34) According to the World Health Organization, 1/3 of the world's population is infected with the tuberculosis bacterium, and tuberculosis is 1 of the greatest infectious causes of death of adults worldwide, killing 1,600,000 people per year.

(35) Efforts to promote abstinence, fidelity, the correct and consistent use of condoms, the delay of sexual debut, and the reduction of concurrent sexual partners represent important elements of strategies to prevent the transmission of HIV/AIDS.

(36) According to UNAIDS—

(A) women and girls make up nearly 60 percent of persons in sub-Saharan Africa who are HIV positive;

(B) women and girls are more biologically, economically, and socially vulnerable to HIV infection; and

(C) gender issues are critical components in the effort to prevent HIV/AIDS and to care for those affected by the disease.

(37) Children who have lost a parent to HIV/AIDS, who are otherwise directly affected by the disease, or who live in areas of high HIV prevalence may be vulnerable to the disease or its socioeconomic effects.

(38) Lack of health capacity, including insufficient personnel and inadequate infrastructure, in sub-Saharan Africa and other regions of the world is a critical barrier that limits the effectiveness of efforts to combat HIV/AIDS, tuberculosis, and malaria, and to achieve other global health goals.

(39) On March 30, 2007, the Institute of Medicine of the National Academies released a report entitled "PEPFAR Implementation: Progress and Promise", which found that budget allocations setting percentage levels for spending on prevention, care, and treatment and for certain subsets of activities within the prevention category—

(A) have "adversely affected implementation of the U.S. Global AIDS Initiative";

(B) have inhibited comprehensive, integrated, evidence based approaches;

(C) "have been counterproductive";

(D) "may have been helpful initially in ensuring a balance of attention to activities within the 4 categories of prevention, treatment, care, and orphans and vulnerable children";

(E) "have also limited PEPFAR's ability to tailor its activities in each country to the local epidemic and to coordinate with the level of activities in the countries' national plans"; and

(F) should be removed by Congress and replaced with more appropriate mechanisms that—

(i) "ensure accountability for results from Country Teams to the U.S. Global AIDS Coordinator and to Congress"; and

(ii) "ensure that spending is directly linked to and commensurate with necessary efforts to achieve both country and overall performance targets for prevention, treatment, care, and orphans and vulnerable children".

(40) The United States Government has endorsed the principles of harmonization in coordinating efforts to combat HIV/AIDS commonly referred to as the "Three Ones", which includes—

(A) 1 agreed HIV/AIDS action framework that provides the basis for coordination of the work of all partners;

(B) 1 national HIV/AIDS coordinating authority, with a broadbased multisectoral mandate; and

(C) 1 agreed HIV/AIDS country-level monitoring and evaluating system.

(41) In the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, of April 26-27, 2001 (referred to in this chapter as the "Abuja Declaration"), the Heads of State and Government of the Organization of African Unity (OAU)—

(A) declared that they would "place the fight against HIV/AIDS at the forefront and as the highest priority issue in our respective national development plans";

(B) committed "TO TAKE PERSONAL RESPONSIBILITY AND PROVIDE LEADERSHIP for the activities of the National AIDS Commissions/Councils";

(C) resolved "to lead from the front the battle against HIV/AIDS, Tuberculosis and Other Related

Infectious Diseases by personally ensuring that such bodies were properly convened in mobilizing our societies as a whole and providing focus for unified national policymaking and programme implementation, ensuring coordination of all sectors at all levels with a gender perspective and respect for human rights, particularly to ensure equal rights for people living with HIV/AIDS"; and

(D) pledged "to set a target of allocating at least 15% of our annual budget to the improvement of the health sector".

2. 22 U.S.C. 7603 (Supp. IV 2010) provides:

Purpose

The purpose of this chapter is to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics and other related and preventable infectious diseases as part of the overall United States health and development agenda by—

(1) establishing comprehensive, coordinated, and integrated 5-year, global strategies to combat HIV/AIDS, tuberculosis, and malaria by—

(A) building on progress and successes to date;

(B) improving harmonization of United States efforts with national strategies of partner governments and other public and private entities; and

(C) emphasizing capacity building initiatives in order to promote a transition toward greater

sustainability through the support of country-driven efforts;

(2) providing increased resources for bilateral and multilateral efforts to fight HIV/AIDS, tuberculosis, and malaria as integrated components of United States development assistance;

(3) intensifying efforts to—

(A) prevent HIV infection;

(B) ensure the continued support for, and expanded access to, treatment and care programs;

(C) enhance the effectiveness of prevention, treatment, and care programs; and

(D) address the particular vulnerabilities of girls and women;

(4) encouraging the expansion of private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS, tuberculosis, and malaria;

(5) reinforcing efforts to—

(A) develop safe and effective vaccines, microbicides, and other prevention and treatment technologies; and

(B) improve diagnostics capabilities for HIV/AIDS, tuberculosis, and malaria; and

(6) helping partner countries to—

(A) strengthen health systems;

(B) expand health workforce; and

(C) address infrastructural weaknesses.

3. 22 U.S.C. 7611 (Supp. IV 2010) provides:

Development of a comprehensive, five-year, global strategy

(a) Strategy

The President shall establish a comprehensive, integrated, 5-year strategy to expand and improve efforts to combat global HIV/AIDS. This strategy shall—

(1) further strengthen the capability of the United States to be an effective leader of the international campaign against this disease and strengthen the capacities of nations experiencing HIV/AIDS epidemics to combat this disease;

(2) maintain sufficient flexibility and remain responsive to—

(A) changes in the epidemic;

(B) challenges facing partner countries in developing and implementing an effective national response; and

(C) evidence-based improvements and innovations in the prevention, care, and treatment of HIV/AIDS;

(3) situate United States efforts to combat HIV/AIDS, tuberculosis, and malaria within the broader United States global health and development agenda, establishing a roadmap to link investments in specific disease programs to the broader goals of strengthening health systems and infrastructure and to integrate and coordinate HIV/AIDS, tuberculosis, or malaria programs with other health or development programs, as appropriate;

(4) provide a plan to—

(A) prevent 12,000,000 new HIV infections worldwide;

(B) support—

(i) the increase in the number of individuals with HIV/AIDS receiving antiretroviral treatment above the goal established under section 7672(a)(3) of this title and increased pursuant to paragraphs (1) through (3) of section 7673(d) of this title; and

(ii) additional treatment through coordinated multilateral efforts;

(C) support care for 12,000,000 individuals infected with or affected by HIV/AIDS, including 5,000,000 orphans and vulnerable children affected by HIV/AIDS, with an emphasis on promoting a comprehensive, coordinated system of services to be integrated throughout the continuum of care;

(D) help partner countries in the effort to achieve goals of 80 percent access to counseling, testing, and treatment to prevent the transmission of HIV from mother to child, emphasizing a continuum of care model;

(E) help partner countries to provide care and treatment services to children with HIV in proportion to their percentage within the HIV-infected population in each country;

(F) promote preservice training for health professionals designed to strengthen the capacity of institutions to develop and implement policies

for training health workers to combat HIV/AIDS, tuberculosis, and malaria;

(G) equip teachers with skills needed for HIV/AIDS prevention and support for persons with, or affected by, HIV/AIDS;

(H) provide and share best practices for combating HIV/AIDS with health professionals;

(I) promote pediatric HIV/AIDS training for physicians, nurses, and other health care workers, through public-private partnerships if possible, including through the designation, if appropriate, of centers of excellence for training in pediatric HIV/AIDS prevention, care, and treatment in partner countries; and

(J) help partner countries to train and support retention of health care professionals and paraprofessionals, with the target of training and retaining at least 140,000 new health care professionals and paraprofessionals with an emphasis on training and in country deployment of critically needed doctors and nurses and to strengthen capacities in developing countries, especially in sub-Saharan Africa, to deliver primary health care with the objective of helping countries achieve staffing levels of at least 2.3 doctors, nurses, and midwives per 1,000 population, as called for by the World Health Organization;

(5) include multisectoral approaches and specific strategies to treat individuals infected with HIV/AIDS and to prevent the further transmission of HIV infections, with a particular focus on the needs of families with children (including the pre-

vention of mother-to-child transmission), women, young people, orphans, and vulnerable children;

(6) establish a timetable with annual global treatment targets with country-level benchmarks for antiretroviral treatment;

(7) expand the integration of timely and relevant research within the prevention, care, and treatment of HIV/AIDS;

(8) include a plan for program monitoring, operations research, and impact evaluation and for the dissemination of a best practices report to highlight findings;

(9) support the in-country or intra-regional training, preferably through public-private partnerships, of scientific investigators, managers, and other staff who are capable of promoting the systematic uptake of clinical research findings and other evidence-based interventions into routine practice, with the goal of improving the quality, effectiveness, and local leadership of HIV/AIDS health care;

(10) expand and accelerate research on and development of HIV/AIDS prevention methods for women, including enhancing inter-agency collaboration, staffing, and organizational infrastructure dedicated to microbicide research;

(11) provide for consultation with local leaders and officials to develop prevention strategies and programs that are tailored to the unique needs of each country and community and targeted particularly toward those most at risk of acquiring HIV infection;

(12) make the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts by—

(A) promoting abstinence from sexual activity and encouraging monogamy and faithfulness;

(B) encouraging the correct and consistent use of male and female condoms and increasing the availability of, and access to, these commodities;

(C) promoting the delay of sexual debut and the reduction of multiple concurrent sexual partners;

(D) promoting education for discordant couples (where an individual is infected with HIV and the other individual is uninfected or whose status is unknown) about safer sex practices;

(E) promoting voluntary counseling and testing, addiction therapy, and other prevention and treatment tools for illicit injection drug users and other substance abusers;

(F) educating men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls;

(G) supporting partner country and community efforts to identify and address social, economic, or cultural factors, such as migration, urbanization, conflict, gender-based violence, lack of empowerment for women, and transportation patterns, which directly contribute to the transmission of HIV;

(H) supporting comprehensive programs to promote alternative livelihoods, safety, and so-

cial reintegration strategies for commercial sex workers and their families;

(I) promoting cooperation with law enforcement to prosecute offenders of trafficking, rape, and sexual assault crimes with the goal of eliminating such crimes; and

(J) working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children;

(13) include programs to reduce the transmission of HIV, particularly addressing the heightened vulnerabilities of women and girls to HIV in many countries; and

(14) support other important means of preventing or reducing the transmission of HIV, including—

(A) medical male circumcision;

(B) the maintenance of a safe blood supply;

(C) promoting universal precautions in formal and informal health care settings;

(D) educating the public to recognize and to avoid risks to contract HIV through blood exposures during formal and informal health care and cosmetic services;

(E) investigating suspected nosocomial infections to identify and stop further nosocomial transmission; and

(F) other mechanisms to reduce the transmission of HIV;

(15) increase support for prevention of mother-to-child transmission;

(16) build capacity within the public health sector of developing countries by improving health systems and public health infrastructure and developing indicators to measure changes in broader public health sector capabilities;

(17) increase the coordination of HIV/AIDS programs with development programs;

(18) provide a framework for expanding or developing existing or new country or regional programs, including—

(A) drafting compacts or other agreements, as appropriate;

(B) establishing criteria and objectives for such compacts and agreements; and

(C) promoting sustainability;

(19) provide a plan for national and regional priorities for resource distribution and a global investment plan by region;

(20) provide a plan to address the immediate and ongoing needs of women and girls, which—

(A) addresses the vulnerabilities that contribute to their elevated risk of infection;

(B) includes specific goals and targets to address these factors;

(C) provides clear guidance to field missions to integrate gender across prevention, care, and treatment programs;

(D) sets forth gender-specific indicators to monitor progress on outcomes and impacts of gender programs;

(E) supports efforts in countries in which women or orphans lack inheritance rights and other fundamental protections to promote the passage, implementation, and enforcement of such laws;

(F) supports life skills training, especially among women and girls, with the goal of reducing vulnerabilities to HIV/AIDS;

(G) addresses and prevents gender-based violence; and

(H) addresses the posttraumatic and psychosocial consequences and provides postexposure prophylaxis protecting against HIV infection to victims of gender-based violence and rape;

(21) provide a plan to—

(A) determine the local factors that may put men and boys at elevated risk of contracting or transmitting HIV;

(B) address male norms and behaviors to reduce these risks, including by reducing alcohol abuse;

(C) promote responsible male behavior; and

(D) promote male participation and leadership at the community level in efforts to promote HIV prevention, reduce stigma, promote participation in voluntary counseling and testing, and provide care, treatment, and support for persons with HIV/AIDS;

(22) provide a plan to address the vulnerabilities and needs of orphans and children who are vulnerable to, or affected by, HIV/AIDS;

(23) encourage partner countries to develop health care curricula and promote access to training tailored to individuals receiving services through, or exiting from, existing programs geared to orphans and vulnerable children;

(24) provide a framework to work with international actors and partner countries toward universal access to HIV/AIDS prevention, treatment, and care programs, recognizing that prevention is of particular importance;

(25) enhance the coordination of United States bilateral efforts to combat global HIV/AIDS with other major public and private entities;

(26) enhance the attention given to the national strategic HIV/AIDS plans of countries receiving United States assistance by—

(A) reviewing the planning and programmatic decisions associated with that assistance; and

(B) helping to strengthen such national strategies, if necessary;

(27) support activities described in the Global Plan to Stop TB, including—

(A) expanding and enhancing the coverage of the Directly Observed Treatment Short-course (DOTS) in order to treat individuals infected with tuberculosis and HIV, including multi-drug resistant or extensively drug resistant tuberculosis; and

(B) improving coordination and integration of HIV/AIDS and tuberculosis programming;

(28) ensure coordination between the Global AIDS Coordinator and the Malaria Coordinator and address issues of comorbidity between HIV/AIDS and malaria; and

(29) include a longer term estimate of the projected resource needs, progress toward greater sustainability and country ownership of HIV/AIDS programs, and the anticipated role of the United States in the global effort to combat HIV/AIDS during the 10-year period beginning on October 1, 2013.

(b) Report

(1) In general

Not later than October 1, 2009, the President shall submit a report to the appropriate congressional committees that sets forth the strategy described in subsection (a).

(2) Contents

The report required under paragraph (1) shall include a discussion of the following elements:

(A) The purpose, scope, methodology, and general and specific objectives of the strategy.

(B) The problems, risks, and threats to the successful pursuit of the strategy.

(C) The desired goals, objectives, activities, and outcome-related performance measures of the strategy.

(D) A description of future costs and resources needed to carry out the strategy.

(E) A delineation of United States Government roles, responsibility, and coordination mechanisms of the strategy.

(F) A description of the strategy—

(i) to promote harmonization of United States assistance with that of other international, national, and private actors as elucidated in the "Three Ones"; and

(ii) to address existing challenges in harmonization and alignment.

(G) A description of the manner in which the strategy will—

(i) further the development and implementation of the national multisectoral strategic HIV/AIDS frameworks of partner governments; and

(ii) enhance the centrality, effectiveness, and sustainability of those national plans.

(H) A description of how the strategy will seek to achieve the specific targets described in subsection (a) and other targets, as appropriate.

(I) A description of, and rationale for, the timetable for annual global treatment targets with country-level estimates of numbers of persons in need of antiretroviral treatment, country-level benchmarks for United States support for assistance for antiretroviral treatment, and numbers of persons enrolled in antiretroviral treatment programs receiving United States support. If global benchmarks are not achieved within the reporting period, the report shall include a description of steps being taken to ensure that global benchmarks will be

achieved and a detailed breakdown and justification of spending priorities in countries in which benchmarks are not being met, including a description of other donor or national support for antiretroviral treatment in the country, if appropriate.

(J) A description of how operations research is addressed in the strategy and how such research can most effectively be integrated into care, treatment, and prevention activities in order to—

(i) improve program quality and efficiency;

(ii) ascertain cost effectiveness;

(iii) ensure transparency and accountability;

(iv) assess population-based impact;

(v) disseminate findings and best practices; and

(vi) optimize delivery of services.

(K) An analysis of United States-assisted strategies to prevent the transmission of HIV/AIDS, including methodologies to promote abstinence, monogamy, faithfulness, the correct and consistent use of male and female condoms, reductions in concurrent sexual partners, and delay of sexual debut, and of intended monitoring and evaluation approaches to measure the effectiveness of prevention programs and ensure that they are targeted to appropriate audiences.

(L) Within the analysis required under subparagraph (K), an examination of additional planned means of preventing the transmission of HIV including medical male circumcision, maintenance of a safe blood supply, public education about risks to acquire

HIV infection from blood exposures, promotion of universal precautions, investigation of suspected nosocomial infections and other tools.

(M) A description of efforts to assist partner country and community to identify and address social, economic, or cultural factors, such as migration, urbanization, conflict, gender-based violence, lack of empowerment for women, and transportation patterns, which directly contribute to the transmission of HIV.

(N) A description of the specific targets, goals, and strategies developed to address the needs and vulnerabilities of women and girls to HIV/AIDS, including—

(i) activities directed toward men and boys;

(ii) activities to enhance educational, microfinance, and livelihood opportunities for women and girls;

(iii) activities to promote and protect the legal empowerment of women, girls, and orphans and vulnerable children;

(iv) programs targeted toward gender-based violence and sexual coercion;

(v) strategies to meet the particular needs of adolescents;

(vi) assistance for victims of rape, sexual abuse, assault, exploitation, and trafficking; and

(vii) programs to prevent alcohol abuse.

(O) A description of strategies to address male norms and behaviors that contribute to the transmis-

sion of HIV, to promote responsible male behavior, and to promote male participation and leadership in HIV/AIDS prevention, care, treatment, and voluntary counseling and testing.

(P) A description of strategies—

(i) to address the needs of orphans and vulnerable children, including an analysis of—

(I) factors contributing to children's vulnerability to HIV/AIDS; and

(II) vulnerabilities caused by the impact of HIV/AIDS on children and their families; and

(ii) in areas of higher HIV/AIDS prevalence, to promote a community-based approach to vulnerability, maximizing community input into determining which children participate.

(Q) A description of capacity-building efforts undertaken by countries themselves, including adherents of the Abuja Declaration and an assessment of the impact of International Monetary Fund macroeconomic and fiscal policies on national and donor investments in health.

(R) A description of the strategy to—

(i) strengthen capacity building within the public health sector;

(ii) improve health care in those countries;

(iii) help countries to develop and implement national health workforce strategies;

(iv) strive to achieve goals in training, retaining, and effectively deploying health staff;

(v) promote the use of codes of conduct for ethical recruiting practices for health care workers; and

(vi) increase the sustainability of health programs.

(S) A description of the criteria for selection, objectives, methodology, and structure of compacts or other framework agreements with countries or regional organizations, including—

(i) the role of civil society;

(ii) the degree of transparency;

(iii) benchmarks for success of such compacts or agreements; and

(iv) the relationship between such compacts or agreements and the national HIV/AIDS and public health strategies and commitments of partner countries.

(T) A strategy to better coordinate HIV/AIDS assistance with nutrition and food assistance programs.

(U) A description of transnational or regional initiatives to combat regionalized epidemics in highly affected areas such as the Caribbean.

(V) A description of planned resource distribution and global investment by region.

(W) A description of coordination efforts in order to better implement the Stop TB Strategy and to address the problem of coinfection of HIV/AIDS and tuberculosis and of projected challenges or barriers to successful implementation.

(X) A description of coordination efforts to address malaria and comorbidity with malaria and HIV/AIDS.

(c) Study of progress toward achievement of policy objectives

(1) Design and budget plan for data evaluation

The Global AIDS Coordinator shall enter into a contract with the Institute of Medicine of the National Academies that provides that not later than 18 months after July 30, 2008, the Institute, in consultation with the Global AIDS Coordinator and other relevant parties representing the public and private sector, shall provide the Global AIDS Coordinator with a design plan and budget for the evaluation and collection of baseline and subsequent data to address the elements set forth in paragraph (2)(B). The Global AIDS Coordinator shall submit the budget and design plan to the appropriate congressional committees.

(2) Study

(A) In general

Not later than 4 years after July 30, 2008, the Institute of Medicine of the National Academies shall publish a study that includes—

(i) an assessment of the performance of United States-assisted global HIV/AIDS programs; and

(ii) an evaluation of the impact on health of prevention, treatment, and care efforts that are supported by United States funding, in-

cluding multilateral and bilateral programs involving joint operations.

(B) Content

The study conducted under this paragraph shall include—

(i) an assessment of progress toward prevention, treatment, and care targets;

(ii) an assessment of the effects on health systems, including on the financing and management of health systems and the quality of service delivery and staffing;

(iii) an assessment of efforts to address gender-specific aspects of HIV/AIDS, including gender related constraints to accessing services and addressing underlying social and economic vulnerabilities of women and men;

(iv) an evaluation of the impact of treatment and care programs on 5-year survival rates, drug adherence, and the emergence of drug resistance;

(v) an evaluation of the impact of prevention programs on HIV incidence in relevant population groups;

(vi) an evaluation of the impact on child health and welfare of interventions authorized under this chapter on behalf of orphans and vulnerable children;

(vii) an evaluation of the impact of programs and activities authorized in this chapter on child mortality; and

(viii) recommendations for improving the programs referred to in subparagraph (A)(i).

(C) Methodologies

Assessments and impact evaluations conducted under the study shall utilize sound statistical methods and techniques for the behavioral sciences, including random assignment methodologies as feasible. Qualitative data on process variables should be used for assessments and impact evaluations, wherever possible.

(3) Contract authority

The Institute of Medicine may enter into contracts or cooperative agreements or award grants to conduct the study under paragraph (2).

(4) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the study under this subsection.

(d) Comptroller General report

(1) Report required

Not later than 3 years after July 30, 2008, the Comptroller General of the United States shall submit a report on the global HIV/AIDS programs of the United States to the appropriate congressional committees.

(2) Contents

The report required under paragraph (1) shall include—

(A) a description and assessment of the monitoring and evaluation practices and policies in place for these programs;

(B) an assessment of coordination within Federal agencies involved in these programs, examining both internal coordination within these programs and integration with the larger global health and development agenda of the United States;

(C) an assessment of procurement policies and practices within these programs;

(D) an assessment of harmonization with national government HIV/AIDS and public health strategies as well as other international efforts;

(E) an assessment of the impact of global HIV/AIDS funding and programs on other United States global health programming; and

(F) recommendations for improving the global HIV/AIDS programs of the United States.

(e) Best practices report

(1) In general

Not later than 1 year after July 30, 2008, and annually thereafter, the Global AIDS Coordinator shall publish a best practices report that highlights the programs receiving financial assistance from the United States that have the potential for replication or adaption, particularly at a low cost, across global AIDS programs, including those that focus on both generalized and localized epidemics.

(2) Dissemination of findings

(A) Publication on Internet website

The Global AIDS Coordinator shall disseminate the full findings of the annual best practices report on the Internet website of the Office of the Global AIDS Coordinator.

(B) Dissemination guidance

The Global AIDS Coordinator shall develop guidance to ensure timely submission and dissemination of significant information regarding best practices with respect to global AIDS programs.

(f) Inspectors General

(1) Oversight plan

(A) Development

The Inspectors General of the Department of State and Broadcasting Board of Governors, the Department of Health and Human Services, and the United States Agency for International Development shall jointly develop 5 coordinated annual plans for oversight activity in each of the fiscal years 2009 through 2013, with regard to the programs authorized under this chapter and sections 2151b-2, 2151b-3, and 2151b-4 of this title.

(B) Contents

The plans developed under subparagraph (A) shall include a schedule for financial audits, inspections, and performance reviews, as appropriate.

(C) Deadline

(i) Initial plan

The first plan developed under subparagraph (A) shall be completed not later than the later of—

(I) September 1, 2008; or

(II) 60 days after July 30, 2008.

(ii) Subsequent plans

Each of the last four plans developed under subparagraph (A) shall be completed not later than 30 days before each of the fiscal years 2010 through 2013, respectively.

(2) Coordination

In order to avoid duplication and maximize efficiency, the Inspectors General described in paragraph (1) shall coordinate their activities with—

(A) the Government Accountability Office; and

(B) the Inspectors General of the Department of Commerce, the Department of Defense, the Department of Labor, and the Peace Corps, as appropriate, pursuant to the 2004 Memorandum of Agreement Coordinating Audit Coverage of Programs and Activities Implementing the President's Emergency Plan for AIDS Relief, or any successor agreement.

(3) Funding

The Global AIDS Coordinator and the Coordinator of the United States Government Activi-

ties to Combat Malaria Globally shall make available necessary funds not exceeding $15,000,000 during the 5-year period beginning on October 1, 2008 to the Inspectors General described in paragraph (1) for the audits, inspections, and reviews described in that paragraph.

(g) Annual study

(1) In general

Not later than September 30, 2009, and annually thereafter through September 30, 2013, the Global AIDS Coordinator shall complete a study of treatment providers that—

(A) represents a range of countries and service environments;

(B) estimates the per-patient cost of antiretroviral HIV/AIDS treatment and the care of people with HIV/AIDS not receiving antiretroviral treatment, including a comparison of the costs for equivalent services provided by programs not receiving assistance under this chapter;

(C) estimates per-patient costs across the program and in specific categories of service providers, including—

(i) urban and rural providers;

(ii) country-specific providers; and

(iii) other subcategories, as appropriate.

(2) Publication

Not later than 90 days after the completion of each study under paragraph (1), the Global

AIDS Coordinator shall make the results of such study available on a publicly accessible Web site.

(h) Message

The Global AIDS Coordinator shall develop a message, to be prominently displayed by each program receiving funds under this chapter, that—

(1) demonstrates that the program is a commitment by citizens of the United States to the global fight against HIV/AIDS, tuberculosis, and malaria; and

(2) enhances awareness by program recipients that the program is an effort on behalf of the citizens of the United States.

4. 22 U.S.C. 7631 (2006 & Supp. IV 2010) provides:

Assistance to combat HIV/AIDS

(a) Omitted

(b) Authorization of appropriations

(1) In general

In addition to funds available under section 104(c) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b(c)) for such purpose or under any other provision of that Act [22 U.S.C. 2151 et seq.], there are authorized to be appropriated to the President, from amounts authorized to be appropriated under section 7671 of this title, such sums as may be necessary for each of the fiscal years 2009 through 2013 to carry out section 104A of the Foreign Assistance Act

of 1961, as added by subsection (a) [22 U.S.C. 2151b-2].

(2) Availability of funds

Amounts appropriated pursuant to paragraph (1) are authorized to remain available until expended.

(3) Allocation of funds

Of the amount authorized to be appropriated by paragraph (1) for the fiscal years 2009 through 2013, such sums as may be necessary are authorized to be appropriated to carry out section 104A(d)(4) of the Foreign Assistance Act of 1961 (as added by subsection (a)) [22 U.S.C. 2151b-2(d)(4)], relating to the procurement and distribution of HIV/AIDS pharmaceuticals.

(c) Food and nutritional support

(1) In general

As indicated in the report produced by the Institute of Medicine, entitled "PEPFAR Implementation: Progress and Promise", inadequate caloric intake has been clearly identified as a principal reason for failure of clinical response to antiretroviral therapy. In recognition of the impact of malnutrition as a clinical health issue for many persons living with HIV/AIDS that is often associated with health and economic impacts on these individuals and their families, the Global AIDS Coordinator and the Administrator of the United States Agency for International Development shall—

(A) follow World Health Organization guidelines for HIV/AIDS food and nutrition services;

(B) integrate nutrition programs with HIV/AIDS activities through effective linkages among the health, agricultural, and livelihood sectors and establish additional services in circumstances in which referrals are inadequate or impossible;

(C) provide, as a component of care and treatment programs for persons with HIV/AIDS, food and nutritional support to individuals infected with, and affected by, HIV/AIDS who meet established criteria for nutritional support (including clinically malnourished children and adults, and pregnant and lactating women in programs in need of supplemental support), including—

(i) anthropometric and dietary assessment;

(ii) counseling; and

(iii) therapeutic and supplementary feeding;

(D) provide food and nutritional support for children affected by HIV/AIDS and to communities and households caring for children affected by HIV/AIDS; and

(E) in communities where HIV/AIDS and food insecurity are highly prevalent, support programs to address these often intersecting health problems through community-based assistance programs, with an emphasis on sustainable approaches.

(2) Authorization of appropriations

Of the amounts authorized to be appropriated under section 7671 of this title, there are authorized to be appropriated to the President such sums as may be necessary for each of the fiscal years 2009 through 2013 to carry out this subsection.

(d) Eligibility for assistance

An organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961 [22 U.S.C. 2151b-2], under this chapter, or under any amendment made by this chapter or by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, for HIV/AIDS prevention, treatment, or care—

(1) shall not be required, as a condition of receiving such assistance—

(A) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(B) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(2) shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements under such provisions of law for refusing to meet any requirement described in paragraph (1).

(e) Limitation

No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(f) Limitation

No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

(g) Sense of Congress relating to food assistance for individuals living with HIV/AIDS

(1) Findings

Congress finds the following:

(A) The United States provides more than 60 percent of all food assistance worldwide.

(B) According to the United Nations World Food Program and other United Nations agencies, food insecurity of individuals infected or living with HIV/AIDS is a major problem in

countries with large populations of such individuals, particularly in African countries.

(C) Although the United States is willing to provide food assistance to these countries in need, a few of the countries object to part or all of the assistance because of fears of benign genetic modifications to the foods.

(D) Healthy and nutritious foods for individuals infected or living with HIV/AIDS are an important complement to HIV/AIDS medicines for such individuals.

(E) Individuals infected with HIV have higher nutritional requirements than individuals who are not infected with HIV, particularly with respect to the need for protein. Also, there is evidence to suggest that the full benefit of therapy to treat HIV/AIDS may not be achieved in individuals who are malnourished, particularly in pregnant and lactating women.

(2) Sense of Congress

It is therefore the sense of Congress that United States food assistance should be accepted by countries with large populations of individuals infected or living with HIV/AIDS, particularly African countries, in order to help feed such individuals.

APPENDIX F

1. 45 C.F.R. 89.1 provides:

Applicability and requirements.

(a) This regulation applies to all recipients unless they are exempted from the policy requirement by the Leadership Act or other statute.

(b) The Department of Health and Human Services (HHS) components shall include in the public announcement of the availability of the grant, cooperative agreement, contract, or other funding instrument involving Leadership Act HIV/AIDS funds the requirement that recipients agree that they are opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. This requirement shall also be included in the award documents for any grant, cooperative agreement or other funding instrument involving Leadership Act HIV/AIDS funds entered into with the recipient.

2. 45 C.F.R. 89.3 provides:

Organizational integrity of recipients.

A recipient must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children ("restricted activities"). A recipient will be found to have objective integrity and independence from such an organization if:

(a) The affiliated organization receives no transfer of Leadership Act HIV/AIDS funds, and Leadership Act HIV/AIDS funds do not subsidize restricted activities; and

(b) The recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act HIV/AIDS funds from other funds is not sufficient. HHS will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not be determinative. Factors relevant to this determination shall include, but not be limited to, the following:

(1) Whether the organization is a legally separate entity;

(2) The existence of separate personnel or other allocation of personnel that maintains adequate separation of the activities of the affiliated organization from the recipient;

(3) The existence of separate accounting and timekeeping records;

(4) The degree of separation of the recipient's facilities from facilities in which restricted activities occur; and

(5) The extent to which signs and other forms of identification that distinguish the recipient from the affiliated organization are present.

APPENDIX G

[SEAL OMITTED] USAID
FROM THE AMERICAN
PEOPLE

Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance
Issued: Feb. 15, 2012

AAPD 12-04

Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, as amended—Conscience Clause Implementation, Medically Accurate Condom Information and Opposition to Prostitution and Sex Trafficking

Subject Category: ASSISTANCE, ACQUISITION MANAGEMENT

Type: POLICY

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are EFFECTIVE AS OF THE ISSUED DATE unless otherwise noted in the guidance below; the directives remain in effect until this office issues a notice of cancellation.

This AAPD: ☐ Is New ☒ Replaces/ ☐ Amends CIB/AAPD No: 05-04 as amended	
Applicable to: ☒ Existing awards; ☐ Modification required ☐ No later than ☒ As noted in guidance below ☒ RFPs/RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e. 8(a), sole source, IQC ☐ Other or N/A	Precedes change to: AIDAR Part(s) Appendix ☒ USAID Automated Directives System (ADS) Chapters 302, 303, and 308 ☐ Code of Federal Regulations 22 CFR 226 ☐ Other ☐ No change to regulations
New Provision/Clause Provided Herein X	

(signature on file)
AMAN S. DJAHANBANI

1. PURPOSE:

This Acquisition & Assistance Policy Directive (AAPD):

A. Provides contract clauses and assistance provisions to be included in contracts, grants and cooperative agreements that obligate or intend to obligate (in the case of solicitations) FY04-FY13

funds made available for HIV/AIDS activities, regardless of the program account, including:

(1) Conscience Clause Implementation (previously titled "Organizations Eligible for Assistance");

(2) Condoms; and

(3) Prohibitions on Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking.

B. Replaces all previous versions of the contract clause and assistance provision titled "Organizations Eligible for Assistance" with the revised versions in Attachments A through C, titled "Conscience Clause Implementation";

C. Provides guidance to Contracting Officers (COs) and Agreement Officers (AOs) regarding what actions to take if an organization raises a Conscience Clause objection; and

D. Replaces and supersedes in their entirety AAPD 05-04, AAPD 05-04 Amendment No. 1, AAPD 05-04 Amendment No. 2, AAPD 05-04 Amendment No. 3, PEB No. 2005-08, and PEB 2008-04.

The provisions in this AAPD impose funding restrictions that enable US AID to exercise administrative remedies should the awardee violate the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, as amended, by not complying with the terms of the award.

Required Actions:

A. COs and AOs must insert the contract clauses and assistance provisions in Attachments A, B, or C in accordance with the conditions in Section 2.A, 2.B, 2.C and 2.D.

B. COs and AOs must consider the guidance regarding "Conscience Clause Objections" in Section 2.E.

C. COs and AOs must comply with the "Organizational Integrity Guidance" in Section 2.F.

2. GUIDANCE:

A. Conditions

AOs must include the provisions in Attachments A, B or C as prescribed in Sections 2.B, 2.C and 2.D below when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account.

B. Assistance Awards

(1) For assistance awards to Non-Governmental Organizations (NGOs) and Non-Exempt Public International Organizations[1] (PIOs) that meet the conditions set forth in Section 2.A above, AOs must include the provisions in Attachment A in each of the following:

(a) Any new Request for Applications (RFA) and Annual Program Statement (APS);

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[1] The PIOs that are statutorily exempted are listed in Section 2.F.

(b) Any new grant or cooperative agreement; and

(c) Any modification to an existing grant or cooperative agreement.

(2) For assistance awards to Alliance for Open Society International (AOSI), Pathfinder or a member of Global Health Council ("GHC"), or InterAction[2] (with the exception of DKT International, Inc.) that meet the conditions set forth in Section 2.A above, AOs must also include the language in the footnote in Attachment A, section A.3 in each of the following:

(a) Any new grant or cooperative agreement; and

(b) Any modification to an existing grant or cooperative agreement.

(3) For assistance awards to the Global Fund to Fight AIDS, Tuberculosis and Malaria[3], the World Health Organization, the International AIDS Vaccine Initiative and any United Nations agency that meet the conditions set forth in Section 2.A above, AOs must include

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[2] The lists of members of GHC and InterAction can be found at: [http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf].

[3] As under previous versions of AAPD 05-04, this AAPD 12-04 does not apply to USAID contributions to capital of multidonor trust funds, such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

the provisions in Attachment Bin each of the following:

(a) Any new grant or cooperative agreement; and

(b) Any modification to an existing grant or cooperative agreement.

C. Contracts

1. For contracts that meet the conditions set forth in Section 2.A above, the CO must include the special provisions in Attachment C in each of the following:

(a) Any new acquisition solicitation;

(b) Any new contract;

(c) Any amendment to an existing contract; and

(d) For any Indefinite Quantity Contract (IQC), in the basic IQC contract at the time that the CO executes a new task order or an amendment to an existing task order.[4]

2. For contracts to AOSI, Pathfinder or a member of Global Health Council ("GHC"), or InterAction[5] (with the exception of DKT Inter-

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[4] The special provisions in Attachment C must be included in the IQC award. Such provisions will be deemed to apply to any order placed under the IQC for HIV/AIDS activities.

[5] The lists of members of GHC and InterAction can be found at: [http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf].

national, Inc.) that meet the conditions set forth in Section 2.A above, COs must also include the footnote in Attachment C, section C.3 in each of the following:

(a) Any new contract or IQC award; and

(b) Any modification to an existing contract or IQC award.

3. Personal Services Contracts (PSCs)

The special provisions in Attachment C do not apply to PSCs. During the period of their contracts, PSCs are considered federal employees for the purposes of *18 USC 202(A)*, *5 CFR part 2635*, and the *USAID General Notice entitled "Employee Review ofthe New Standards of Conduct."*

4. Grants under Contracts

If a contract provides for the contractor to execute grants to NGOs (not-for-profits or for-profits), then the AO must provide in the solicitation that the contractor must comply with the requirement to use the assistance provisions in Section 2.B of this AAPD. The contractor must do this when awarding grants under its contract (in compliance with ADS 302.3.5.6(b)).

D. Timing

(1) **Solicitations:** COs and AOs will include the solicitation provisions as prescribed in Attachments A, B or C in new assistance solicitations or acquisition solicitations that are issued on or after the effective date of this AAPD.

(2) **New awards:** COs and AOs will include the contract clauses and assistance provisions as prescribed in Attachments A, B, or C in new contracts, grants, and cooperative agreements that are executed on or after the effective date of this AAPD.

(3) **Modifications:** COs and AOs will replace all previous versions of the contract clauses and assistance provisions as prescribed in Attachments A, B, or C, when such instruments are modified on or after the effective date of this AAPD, to add funding for any reason.

This modification must be bilateral (i.e., must be signed by the US AID *AOICO* and the awardee). By signing the modification, the contractor or recipient agrees to be bound by the clause requirements. Current contracts, grants, and cooperative agreements need not be modified to include the new clauses until they are modified to add funds.

E. Conscience Clause Objections

Operating units design solicitations following evidence-based and country-specific approaches to create the most effective program with the most efficient use of resources. Linkages and referrals—across HIV/AIDS services and between HIV/AIDS programs and other health or development programs—to create multisectoral or comprehensive programs are frequently programmatically appropriate in order to achieve desired health outcomes.

Under Sections A.1, B.1 and C.1 in Attachments A, B, and C, respectively, organizations shall not be required to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS or to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection. For example, for moral or religious reasons, some organizations choose not to provide condoms or other contraceptives. To accommodate an organization's moral or religious objection as described in these sections, solicitations for HIV/AIDS programs must specify that an organization is eligible to compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award, even where the organization has a religious or moral objection to a specific activity or activities contemplated under the award. In organizing a consortium, members have flexibility to determine how to combine forces to provide comprehensive or integrated services.

Ultimately, an organization with a religious or moral objection may choose to submit an offer that does not respond to all of the specified activities. If such organization has properly notified the cognizant CO or AO of a religious or moral objection pursuant to the procedures set forth under Sections A.1(a) or C.1(a) in Attachments A and C, respectively, the offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. The cognizant CO or AO must consult GC/A&A immediately after receiving notification of a

religious or moral objection to activities in a solicitation. Depending on the specific nature of the religious or moral objection, which activities the applicant has an objection to implementing, and the design of the particular solicitation, GC will work with the relevant AO/CO and technical staff to identify an appropriate approach.

F. Organization Issues

Sections A.3(b) and C.3(b) in Attachments A and C, respectively, require organizations to state in the award that they oppose the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. COs/AOs must therefore consider the "Organizational Integrity Guidance" below when determining a prospective or existing organization's eligibility or compliance with these sections. COs/AOs must also obtain clearance from Agency legal counsel before issuing any written determination relating to organizational integrity pertaining to USAID awards.

Organizational Integrity of Recipient

Organizations must state in the award that they oppose prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. Due to organizational affiliations, such statement may be adversely implicated by the statements or activities of an affiliate of the awardee. In such cases, AOs and COs must consider the below guidance to assess whether there is such a risk. The Federal Acquisition Regulation (FAR) subpart 2.101 defines "Affiliates" as follows:

"Affiliates" means associated business concerns or individuals if, directly or indirectly—

(1) Either one controls or can control the other; or

(2) A third party controls or can control both.

There is no corresponding definition of "affiliates" in USAID assistance regulations.

Contractors and recipients of grants and cooperative agreements (hereafter collectively referred to as "Recipients") must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the Recipient's opposition to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children ("restricted activities"). A Recipient will be found to have objective integrity and independence from such an organization if:

(1) The affiliated organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize restricted activities; and

(2) The Recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient. USAID will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not be determinative. Factors relevant to this determination shall include, but are not limited to:

(a) Whether the affiliated organization is a legally separate entity;

(b) The existence of separate personnel or other allocation of personnel that maintains adequate separation of the activities of the affiliated organization from the recipient;

(c) The existence of separate accounting and timekeeping records;

(d) The degree of separation of the Recipient's facilities from facilities in which restricted activities occur; and

(e) The extent to which signs and other forms of identification that distinguish the Recipient from the affiliated organization are present.

The following organizations are statutorily-exempt from the requirement to state in their awards that they oppose the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children: the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency (the "Statutorily-Exempt Organizations"). As such, AOs for awards to Statutorily-Exempt Organizations will not need to consider the "Organizational Integrity Guidance" above.

3. **BACKGROUND**:

Attachment D includes the legislative and litigation background of this AAPD 12-04, and its predecessor AAPDs, and a brief summary of the history of the Organizational Integrity Guidance and the limited contract-

ing exception for providers of certain commercial items or services.

4. **POINTS OF CONTACT**:

USAID Contracting Officers and Agreement Officers may direct their questions about this AAPD to Jacqueline L. Taylor, M/OAA/P, Phone: (202) 567-4673; email: jltaylor@usaid.gov.

Contractors, recipients, and prospective offerors for contracts or assistance awards must direct their questions to the cognizant Contracting Officer or Agreement Officer for the award.

All other inquiries about this AAPD may be addressed to Diane Bui, GC/GH & EGAT, Phone: (202) 712-0529 e-mail: dbui@usaid.gov or to Diana Weed, GC/GH & EGAT, Phone: (202) 712- 5245 e-mail: dweed@usaid.gov.

ATTACHMENT A—Assistance Provisions—U.S. Non-Governmental Organizations (NGOs), Non-U.S. NGOs and Non-Exempt Public International Organizations (PIOs)[6]

A.1 Conscience Clause Implementation (Assistance) (February 2012)

(a) Prescription. AOs must include the following revised Standard Provision A.1(a) in any new Request for Applications (RFA) or Annual Program Statement (APS) in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD.

"CONSCIENCE CLAUSE IMPLEMENTATION (ASSISTANCE)—SOLICITATION PROVISION (FEBRUARY 2012)

(a) An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

(1) Shall not be required, as a condition of receiving such assistance—

(i) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/ AIDS; or

(ii) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

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[6] The list of statutorily exempt PIOs is included in Attachment B.

(2) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a)(1) above.

(b) An applicant who believes that this solicitation contains provisions or requirements that would require it to endorse or use an approach or participate in an activity to which it has a religious or moral objection must so notify the cognizant Agreement Officer in accordance with the Mandatory Standard Provision titled "Notices" as soon as possible, and in any event not later than 15 calendar days before the deadline for submission of applications under this solicitation. The applicant must advise which activity(ies) it could not implement and the nature of the religious or moral objection.

(c) In responding to the solicitation, an applicant with a religious or moral objection may compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award. Alternatively, such applicant may limit its application to those activities it can undertake and must indicate in its submission the activity(ies) it has excluded based on religious or moral objection. The offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. In addition to the notification in para-

graph (b) above, the applicant must meet the submission date provided for in the solicitation.

(End of Provision)"

(b) Prescription. AOs must include the following revised Standard Provision A.1(b) in any new assistance award, or amendment to an existing award (if not already incorporated into the agreement), to U.S. NGOs, non-U.S. NGOs, or non-exempt PIOs in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

"CONSCIENCE CLAUSE IMPLEMENTATION (ASSISTANCE) (FEBRUARY 2012)

An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

(a) Shall not be required, as a condition of receiving such assistance—

(1) To endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(2) To endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(b) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or coopera-

tive agreements for refusing to meet any requirement described in paragraph (a) above.

(End of Provision)"

A.2 Condoms (Assistance) (June 2005)

Prescription. (Note: This provision remains unchanged from the version in AAPD 05-04, so it retains the same title and effective date.) AOs must include the following Standard Provision in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award or amendment to an existing award (if not already incorporated into the agreement) to U.S. NGOs, non-U.S. NGOs, or non-exempt PIOs in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

"CONDOMS (ASSISTANCE) (JUNE 2005)

Information provided about the use of condoms as part of projects or activities that are funded under this agreement shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with US AID's fact sheet entitled, "US AID HIV/STI Prevention and Condoms. This fact sheet may be accessed at:

http://www.usaid.gov/our_work/global_health/aids/TechAreas/prevention/condomfactsheet.html.

(End of Provision)"

ATTACHMENT B—Assistance Provisions—The Global Fund to Fight AIDS, Tuberculosis and Malaria[8], the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency

B.1 Conscience Clause Implementation (Assistance) (February 2012)

Prescription. AOs must include the following revised Standard Provision B.1 in any new assistance award or amendment to an existing award (if not already incorporated into the agreement) to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards.

"CONSCIENCE CLAUSE IMPLEMENTATION (ASSISTANCE) (FEBRUARY 2012)

An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

(a) Shall not be required, as a condition of receiving such assistance-

(1) to endorse or utilize a multi sectoral or comprehensive approach to combating HIV/ AIDS; or

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[8] As under AAPD 05-04, this AAPD 12-04 does not apply to USAID contributions to capital of multi donor trust funds. such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

(2) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(b) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a) above.

(End of Provision)"

B.2 Condoms (Assistance) (June 2005)

Prescription. (Note: This provision remains unchanged from original AAPD 05-04, dated June 9, 2005, so it retains the same title and effective date.) AOs must include the following Standard Provision in any new assistance award or amendment to an existing award (if not already incorporated into the agreement) to the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards.

"CONDOMS (ASSISTANCE) (JUNE 2005)

Information provided about the use of condoms as part of projects or activities that are funded under this agreement shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with USAID's fact sheet entitled, "USAID HIV/STI Prevention and Condoms. This fact sheet may be accessed at:

http://www.usaid.gov/our_work/global_health/aids/TechAreas/prevention/condomfactsheet.html.

(End of Provision)"

B.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance—the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any United Nations agency) (April 2010)

Prescription. (Note: This provision remains unchanged from the version in AAPD 05-04 Amendment 3, dated April 13, 2010, so it retains the same title and effective date.) AOs must include the following Standard Provision in any new assistance award or amendment to an existing award (if not already incorporated into the agreement) to the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards.

"PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE—THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, THE WORLD HEALTH ORGANIZATION, THE INTERNATIONAL AIDS VACCINE INITIATIVE, AND ANY UNITED NATIONS AGENCY) (APRIL 2010)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b) The following definitions apply for purposes of this provision:

"Commercial sex act" means any sex act on account of which anything of value is given to or received by any person.

"Prostitution" means procuring or providing any commercial sex act and the "practice of prostitution" has the same meaning.

"Sex trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(c) The recipient shall insert this provision, which is a standard provision, in all subawards.

(d) This provision includes express terms and conditions of the award and any violation of it shall be grounds for unilateral termination of the award by US AID prior to the end of its term.

(End of Provision)"

ATTACHMENT C—Acquisition Provisions

C.1 Conscience Clause Implementation (Acquisition) (February 2012)

(a) Prescription. COs must include the following revised Special Provision C.1(a) in any new acquisition solicitation in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD.

"CONSCIENCE CLAUSE IMPLEMENTATION (ACQUISITION)—SOLICITATION PROVISION (FEBRUARY 2012)

(a) An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

(1) Shall not be required, as a condition of receiving such assistance—

(i) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(ii) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(2) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a)(1) above.

(b) An offeror who believes that this solicitation contains provisions or requirements that would require it to endorse or use an approach or participate in an activity to which it has a religious or moral objection must so notify the cognizant Contracting Officer in accordance with AIDAR 752.7006 (Notices) as soon as possible, and in any event not later than 15 calendar days before the deadline for submission of applications under this solicitation. The offeror must advise which activity(ies) it could not implement and the nature of the religious or moral objection.

(c) In responding to the solicitation, an offeror with a religious or moral objection may compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award. Alternatively, such offeror may limit its proposal to those activities it can undertake and should indicate in its submission the activity(ies) it has excluded based on religious or moral objection. The offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. In addition to the notification in paragraph (b) above, the offeror must meet the submission date provided for in the solicitation.

(End of Provision)"

(b) Prescription. COs must include the following revised Special Provision C.1(b) in any new acquisition

award or amendment to an existing acquisition award (if not already incorporated into the agreement), to contractors in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime contractor must flow this provision down in all subcontracts.

"CONSCIENCE CLAUSE IMPLEMENTATION (ACQUISITION) (FEBRUARY 2012)

An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

(a) Shall not be required, as a condition of receiving such assistance—

(1) to endorse or utilize a multi sectoral or comprehensive approach to combating HIV/AIDS; or

(2) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(b) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a) above.

(End of Provision)"

C.2 Condoms (Acquisition) (June 2005)

Prescription. (Note: This provision remains unchanged from the version in original AAPD 05-04, dated June 9,

2005, so it retains the same title and effective date.) COs must include the following Special Provision in any new acquisition solicitation, and any new acquisition award or amendment to an existing award (if not already incorporated into the award) in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime contractor must flow this provision down in all subcontracts.

"CONDOMS (ACQUISITION) (WNE 2005)

Information provided about the use of condoms as part of projects or activities that are funded under this contract shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with USAID's fact sheet entitled, "USAID HIV/STI Prevention and Condoms. This fact sheet may be accessed at:

http://www.usaid.gov/our_work/global_health/aids/TechAreas/prevention/condomfactsheet.html.

(End of Provision)"

C.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Acquisition) (April 2010)

Prescription. This provision remains unchanged from the version in AAPD 05-04 Amendment 3, dated April 13, 2010, so it retains the same title and effective date.) COs must include the following Special Provision in any new acquisition solicitation, and any new acquisition award or amendment to an existing award (if not already incorporated into the award) in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD.

The prime contractor must flow this provision down in all subcontracts.

"PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ACQUISITION) (APRIL 2010)

(a) This contract is authorized under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Pub. L. No. 108-25), as amended. This Act enunciates that the U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. The contractor shall not use any of the funds made available under this contract to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b)(1) Except as provided in (b)(2) and (b)(3), by its signature of this contract or subcontract for HIV/ AIDS activities, a non-governmental organization or public international organization awardee/ subawardee agrees that it is opposed to the practices of prostitution and sex traffick-

ing because of the psychological and physical risks they pose for women, men, and children.[9]

(2) The following organizations are exempt from (b)(1): the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.

(3) Contractors and subcontractors are exempt from (b)(1) if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

(4) Notwithstanding section (b)(3), not exempt from (b)(1) are contractors and subcontractors that implement HIV/AIDS programs under this contract or subcontract by:

(i) providing supplies or services directly to the final populations receiving such supplies or services in host countries;

(ii) providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services

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[9] The following footnote should only be included in awards to Alliance for Open Society International (AOSI), Pathfinder, or a member of GHC or InterAction (with the exception of DKT International, Inc.):

"Any enforcement of this clause is subject to Alliance for Open Society International v. USAID, 05 Civ. 8209 (S.D.N.Y., orders filed on June 29, 2006 and August 8, 2008) (orders granting preliminary injunction) for the term of the Orders."

to the final populations receiving such supplies and services; or

(iii) providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

(c) The following definitions apply for purposes of this provision:

"Commercial sex act" means any sex act on account of which anything of value is given to or received by any person.

"Prostitution" means procuring or providing any commercial sex act and the "practice of prostitution" has the same meaning.

"Sex trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(d) The contractor shall insert this provision in all subcontracts.

(e) Any violation of this provision will result in the immediate termination of this award by USAID.

(f) This provision does not affect the applicability of FAR 52.222-50 to this contract.

(End of Provision)"

The lists of members of GHC and InterAction can be found at: [http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf].

ATTACHMENT D – Background

A. Leadership Act Statutory Provisions:

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25 (2003) (the "Leadership Act") authorized funds to be appropriated for HIV/AIDS activities for the fiscal years 2004-2008. The Leadership Act was reauthorized by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293 (2008) (the "Reauthorization Act"), which authorized funds to be appropriated for HIV/AIDS activities for the fiscal years 2009-2013. The Leadership Act, as amended, includes, among other things, certain restrictions on the award and use of funds for HIV/AIDS activities, and requires recipients of those funds to have certain policies in place.

The Leadership Act was amended by the Consolidated Appropriations Act of 2004, Division D – Foreign Operations, Export Financing, and Related Programs Appropriations ("FY 04 Appropriations Act"), Title II – Bilateral Economic Assistance, United States Agency for International Development, Child Survival and Health Programs Fund to exempt the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency from certain requirements.

Section 301 of the Leadership Act, as amended, entitled "Assistance to Combat HIV/AIDS," includes the following provisions:

"(d) ELIGIBILITY FOR ASSISTANCE. – An organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961, under this Act, or under any amendment made by this Act or by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, for HIV/AIDS prevention, treatment, or care—

(1) shall not be required, as a condition of receiving such assistance—

(A) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(B) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(2) shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements under such provisions of law for refusing to meet any requirement described in paragraph (1).

(e) LIMITATION. – No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and neces-

sary pharmaceuticals and commodities, including test kits, condoms, and when proven effective, microbicides.

(f) LIMITATION. – No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency."

During legislative debate on the Leadership Act, in response to a question from Senator Leahy on the Senate floor regarding provision (f) above, Senator Frist stated that "a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision." 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Frist).

The Statement of Managers of the FY 04 Appropriations Act states that the conferees "intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO)."

Although the above-named public international organizations are exempt from section 301(f) of the Leadership Act, they are subject to the AAPD 12-04 provisions that implement sections 301(d) and (e) of the Leadership Act,

as amended. However, as under AAPD 05-04, this AAPD 12-04 does not apply to USAID contributions to capital of multidonor trust funds, such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

B. Leadership Act Litigation

Alliance for Open Society International ("AOSI")/Pathfinder International ("Pathfinder") – U.S. District Court for the Southern District of New York:

On June 29, 2006, the District Court for the Southern District of New York issued a preliminary injunction order, pending a final judgment on the merits, prohibiting Defendants USAID and HHS from enforcing the statutory requirement to have a policy opposing prostitution and sex trafficking against AOSI or Pathfinder.

Defendants also were prohibited from investigating or auditing AOSI or Pathfinder regarding compliance with this statutory requirement.

On August 7, 2008, the Court granted the request of two associations, Global Health Council ("GHC") and InterAction, to be added as plaintiffs in the AOSI suit and extended the reach of the preliminary injunction to cover the members of those associations as well.

Therefore, in addition to being prohibited from enforcing the statutory requirement to have a policy opposing prostitution and sex trafficking against AOSI or Pathfinder, USAID and HHS are now prohibited from enforcing this statutory requirement against any member of GHC or InterAction. They are likewise forbidden from investigating or auditing members of GHC or In-

terAction regarding compliance with this statutory requirement.

GHC and InterAction have provided USAID with lists of member organizations, and these lists can be found at: [http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf].

DKT International, Inc. ("DKT") – D.C. Circuit Court of Appeals:

Although DKT is a member of GHC, the D.C. Circuit Court of Appeals previously held in a separate lawsuit that USAID may enforce the statutory requirement to have a policy opposing prostitution and sex trafficking against DKT. In its order, the District Court for the Southern District of New York specifically barred DKT from benefiting from the preliminary injunction. Therefore, USAID continues to enforce the statutory requirement against DKT.

C. Organizational Integrity Guidance

In July 2007, USAID issued guidance designed to provide additional clarity for COs and AOs regarding the application of Section 301(f) of the Leadership Act.

This clarifying guidance was also issued to Contracting Specialists, Contracting Officers' Technical Representatives (COTRs) and Agreement Officers' Technical Representatives (AOTRs), Health Officers, and USAID's implementing partners (e.g., grantees, recipients and contractors).

The guidance noted that in enacting the Leadership Act, Congress developed a framework to combat the global spread of HIV/AIDS, tuberculosis, and malaria. The

Leadership Act provides that all HIV/AIDS funding recipients, subject to limited exceptions, must have a policy explicitly opposing prostitution and sex trafficking. The guidance noted it is critical to the effectiveness of Congress's plan and to the U.S. Government's foreign policy underlying this effort, that the integrity of Leadership Act HIV/AIDS programs and activities implemented by organizations receiving Leadership Act HIV/AIDS funds is maintained, and that the U.S. Government's message opposing prostitution and sex trafficking is not confused by conflicting positions of implementing organizations.

Accordingly, USAID provided Organizational Integrity Guidance in AAPD 05-04 Amendment No. 1, and Amendment No. 3 to AAPD 05-04 modified that Organizational Integrity Guidance.

The guidance clarified that the Government's organizational partners that have agreed that they oppose prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children, may, consistent with the policy requirement, maintain an affiliation with separate organizations that do not satisfy the policy requirement, provided that such affiliations do not threaten the integrity of the Government's programs and its message opposing prostitution and sex trafficking, as specified in this guidance. To maintain program integrity, adequate separation is required between any federally funded partner organization and an affiliate that engages in activities inconsistent with a policy against prostitution and sex trafficking.

The criteria for affiliate independence are modeled on criteria upheld as constitutional by the U.S. Court of Appeals for the Second Circuit in *Velazquez v. Legal Services Corporation*, 164 F. 3d 757, 767 (2d Cir. 1999), and *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F. 3d 219, 229-33 (2d Cir. 2006), cases involving similar organization-wide limitations applied to recipients of federal funding.

A recipient of Leadership Act HIV/AIDS funds may maintain an affiliation with an independent organization that engages in activities inconsistent with an opposition to prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children while remaining in compliance with the policy requirement.

The independent affiliate's position on these issues will have no effect on the recipient organization's eligibility for Leadership Act HIV/AIDS funds, so long as the affiliate satisfies the criteria for objective integrity and independence, as detailed in the guidance. By ensuring adequate separation between the recipient and affiliate organizations, these criteria guard against a public perception that the affiliate's views on prostitution and sex trafficking may be attributed to the recipient organization and thus to the Government, thereby avoiding the risk of confusing the Government's message opposing prostitution and sex trafficking.

D. Limited Contracting Exception for Providers of Certain Commercial Items or Services:

In October 2007, the contract provision implementing Sections 301(e) and 301(f) of the Leadership Act was amended in AAPD 05-04 Amendment No. 2 to provide a

limited exemption from the policy requirement contained in Section 301(f) (the "policy requirement") for certain contracts and subcontracts for specific types of items and services. The provision exempts from the policy requirement contractors and subcontractors who are providing commercial items or services and where such activities do not involve any HIV/AIDS programmatic activities per se.

The Leadership Act policy requirement remains applicable to all contractors and subcontractors who directly implement HIV/AIDS programs by providing:

(1) Supplies or services directly to the final populations receiving such supplies or services in host countries:

(2) Technical assistance and training directly to host country individuals or organizations on how supplies or services are provided to the final populations receiving such supplies and services; or

(3) The types of services listed in FAR 37.203(b)(1)-(6) that involve:

- giving advice about substantive policies of a recipient,
- giving advice regarding the activities referenced in (1) and (2), or
- making decisions or functioning in a recipient's chain of command.